

Professional Team Sports and Employment Law in Australia: From Individualism to Collective Labor Relations?

Hayden Opie

Graham F. Smith

Follow this and additional works at: <http://scholarship.law.marquette.edu/sportslaw>



Part of the [Entertainment and Sports Law Commons](#)

Repository Citation

Hayden Opie and Graham F. Smith, *Professional Team Sports and Employment Law in Australia: From Individualism to Collective Labor Relations?*, 2 Marq. Sports L. J. 211 (1992)

Available at: <http://scholarship.law.marquette.edu/sportslaw/vol2/iss2/6>

This Article is brought to you for free and open access by the Journals at Marquette Law Scholarly Commons. For more information, please contact megan.obrien@marquette.edu.

PROFESSIONAL TEAM SPORTS AND EMPLOYMENT LAW IN AUSTRALIA: FROM INDIVIDUALISM TO COLLECTIVE LABOUR RELATIONS?*

HAYDEN OPIE**

GRAHAM F. SMITH***

INTRODUCTION

There was a time when sport and the law barely interacted at all.¹ Aside from happenings such as occasional prosecutions for violent or unruly behaviour among players or spectators,² claims for damages for personal injuries³ and even disputes pertaining to the affairs of the small number of professional athletes,⁴ sport seemed reassuringly divorced from the worldly and somewhat grubby realm of commercial and legal dealings.⁵ Indeed, in those idyllic days of amateurism, recourse by athletes to legal

* An earlier version of this paper was presented on 18 May 1991 to The Law of Professional Team Sports Conference conducted by the Australian and New Zealand Sports Law Association Inc. and The University of Melbourne Law School Continuing Education Program. A slightly different version of this paper is published in (1992) 15 *University of New South Wales Law Journal* 313 under the title "The Withering of Individualism; Professional Team Sports and Employment Law." This paper appears in the *Marquette Sports Law Journal* with the kind permission of the former Journal. The authors acknowledge the assistance of Jane Ellis, law student, The University of Melbourne, for assistance in collating footnote material for this paper.

** Faculty of Law, The University of Melbourne, Parkville, Victoria, 3052, Australia.

*** Faculty of Law, The University of Melbourne, Parkville, Victoria, 3052, and partner, Clayton Utz, Solicitors and Attorneys, Melbourne, Australia.

1. The time we have principally in mind is the Victorian age in England - a period in which much of modern sport has its foundations. For a broader consideration of the historical relationship between sport and law, see G.M. Kelly, *The Sport Revolution and the Legitimation of Sports Law*, 1(1) ANZSLA NEWSLETTER 6 (1991).

2. *E.g.*, *R. v. Moore* 14 T.L.R. 229 (1898) (soccer player committed a foul charge on opponent causing his death - convicted of manslaughter), *Rex v. Billingham, Savage & Skinner*, 2 Car. & P. 234 (1825), 172 E.R. 106 (spectators at a prize-fight convicted of rioting when a magistrate tried to prevent the fight taking place).

3. *E.g.*, *Cleghorn v. Oldham*, 43 T.L.R. 465 (1927) (caddy struck by careless swing of golf club), *Gibbs v. Barking Corporation*, [1936] 1 All E.R. 115 (negligent failure by instructor to provide assistance to student vaulting over "horse" in gymnastics class), *Watson v. South Australian Trotting Club, Inc.*, [1938] S.A.S.R. 94 (occupier of trotting track not liable to rider injured in unusual fall occurring when running railing became dislodged).

4. *E.g.*, *McLaughlin v. Darcy*, 18 N.S.W. St.R. 585 (1918).

5. Other instances of interaction between law and sport can be readily identified, such as disputes over sport-related gambling debts and challenges to disciplinary action. *See also* Kelly,

remedies was rarely countenanced. When recourse was taken, such moves were regarded as ungentlemanly and outside the bounds of acceptable conduct. Legal intervention could only sully the purity of sport. Sport was the antithesis of work whereas law was, and still is, inextricably part of the structure of employment and industry.

A microcosm of this divergence of sport and law was found in the ethos of team sports on the one hand and, on the other, the growth of interest in legal circles about promoting free economic competition.

The sports ethos originating in the Victorian era is well-known for ideas of fair play, "sportsmanship," acceptance of the decisions of umpires, graciousness in defeat, humility in victory and playing the game for its own sake — not for reward. The operation of certain strands of this ethos in team sports, however, is not as well recognized. There is a strong element of subordination of the individual's interests to the collective interests of the team and, sometimes, the sport. This is found in notions that non-selection for the team must be unquestioningly accepted, "unselfish" play is praiseworthy and a club is entitled indefinitely to unswerving loyalty and service from its players. (The latter notion has provided much of the early philosophical basis for rules allocating players to clubs and controlling their movement between clubs.) Significant also are the notoriously vague disciplinary rules requiring that players not act "contrary to the interests of the game or bring it into disrepute."

Against the background of subordination of individual autonomy and interests in team sports, the law of contract was evolving important and vigorous principles about freedom of contract and the right of the individual to be free from unreasonable restraints on trade. Of course, as long as the law and the world of sport pursued their separate paths, the ethos of subordination and the principle of economic freedom did not collide.

The catalysts changing this curious stand-off were related to developments in professionalism among athletes and the commercialisation of sport in Australia over the past 30 or so years. Hitherto amateur athletes became professional, or at least semi-professional, and at the same time valuable "assets" for their teams. Television and advertising revenues permitted, or were required to finance (depending on one's view), payments to the newly professional athletes sought by administrators seeking to build successful teams. With substantial financial interests as well as the ambitions of athletes and clubs at stake, the law of contract and related doctrines at last had a basis on which to take a role. After a lag (the reasons for which will be

supra note 1, at 6, Hayden Opie; 'See You in Court!' *Recent Developments in Marketing, Selection and Disciplinary Disputes*, 7(1) SPORTING TRADITIONS 75 (1990).

discussed below), a collision ensued. The law was used as a tool to promote the individual interests of players against the collective interests of teams and governing sports associations. It was fundamental in freeing professional athletes and, quite significantly, their clubs from many restrictive employment practices. The beginning of this new era in Anglo-Australian law was the 1963 decision in *Eastham v. Newcastle United Football Club Ltd.*⁶

We maintain that until very recent times this new individualism had been gaining ascendancy but the law has now begun to give greater weight to the collective interests of team sports.⁷ At the same time, collective labour relations law is emerging within team sports in Australia. We will demonstrate that both of these developments are leading to a "withering" of individualism. Caution restrains us from pronouncing it dead.

Before we examine these developments in greater detail, it is important to reflect upon the process of legal change and note that the law in its interaction with sport has lagged behind its interaction with other commercial aspects of our society. This is apart from the reluctance of the participants themselves to utilise the legal process. One cause of the initial non-interventionist approach of the law in team sports is what we denote as the "sports mystique." While professional team sports had become significant commercial enterprises through the 1960s (if not earlier), this reality was not reflected in the social consciousness. Thus, judges and lawyers were reluctant to perceive sport and athletes in commercial terms like working in a factory, building a house, farming wheat, staging a ballet or being a professional entertainer. The other feature of the process of legal change needing emphasis is that when lawyers view an aspect of social intercourse as essentially private or domestic in nature, there is a tendency to move very cautiously into that field.⁸ In this sense, there are distinct similarities in how the law has moved at a snail's pace to govern *de facto* relationships⁹ and to govern sporting relationships. We may call this feature the "natural caution of the law."

These two features are particularly striking upon examination of specific issues in sports law. For instance, lawyers have been loathe to categorise athletes as employees, seeing them instead as amateurs or independent con-

6. 1 Ch. 413 (1964).

7. See *Buckenara v. Hawthorn Football Club Ltd.*, [1988] V.R. 39 and *Hawthorn Football Club Ltd. v. Harding*, [1988] V.R. 49. For reasons which we will explain below, we do not regard the recent decision of the Full Court of the Federal Court of Australia in *Adamson v. New South Wales Rugby League Ltd.*, 31 F.C.R. 242 (1991) (special leave to appeal to the High Court of Australia refused 24 October 1991) as being inconsistent with our overall thesis.

8. *E.g.*, *Cameron v. Hogan*, 51 C.L.R. 358 (1934).

9. See *Baumgartner v. Baumgartner*, 2 N.S.W.L.R. 406, 412-15 (1985) (Kirby P).

tractors. Sport is not "work." Comradeship on the field has not been translated into a collective antipathy by the players toward their employers. These factors, together with the sports mystique and the natural caution of the law, have kept sport outside the mainstream of the institutional industrial relations system. In 1956, for instance, the Federal Industrial Registrar decided that a predecessor to the Australian Football League Players' Association was ineligible to register as a federal union. The decision was based on a finding that the players could not engage in an "industrial dispute" because there was no "industry" of playing Australian Rules football. (The existence of an industry is a necessary precondition to registration.) This finding seems to have rested on a view that the playing of sport — even for remuneration — was not in itself industrial activity.¹⁰

It is remarkable how attitudes have changed. Most professional team sports in Australia¹¹ are now entering the realm of collective labour relations law, just as they entered the realm of individual employment law several decades ago. Recently, we have witnessed a growing professionalism among the various players' associations. Even in cases where those associa-

10. 84 C.A.R. 675 (1956). The reasons why the playing of sport needed to be "industrial" in nature are explained towards the end of this paper, but in essence the requirement stems from the framing of the labour power in the Australian Constitution.

11. A wide range of team sports is played professionally or semi-professionally in Australia. Traditionally, the two main winter sports have been Australian Rules football and rugby league. The former dominated in the States of Victoria, South Australia, Western Australia and Tasmania and the latter in New South Wales and Queensland. Separate leagues existed for each State and on the whole were based in the State capital. For instance, the Victorian Football League consisted of 12 teams, 11 based in the State capital, Melbourne, and one in the largest Victorian regional centre, Geelong. Contests between States and between league premiers occurred occasionally. Recently, the Victorian Football League has developed into a national league with teams in all State capital cities except Tasmania and is now known as the Australian Football League. Its following is not strong in New South Wales and Queensland and the preponderance of teams are located in Melbourne. The old leagues in each State have been relegated to the status of minor leagues. The New South Wales Rugby League has become a semi-national league with teams in New South Wales, Queensland and the Australian Capital Territory. Soccer developed as a major sport in Australia as a result of post-World War II immigration and there is a National Soccer League. At times its growth has been restricted by ethnic rivalries and the loss of its best players to European teams. It plays a summer fixture to avoid competition with the other football codes. Basketball has emerged as a popular winter sport over the past decade and a men's National Basketball League has the widest geographic coverage of any national sports league in Australia. A women's semi-professional basketball league has a smaller following and geographic spread and is likely to be challenged by the very popular netball which is developing a national competition.

Cricket is the dominant summer team sport. It is played professionally at international and interstate levels with separate minor league competitions in each State capital city. A very recent development is a small semi-professional baseball league called the Australian Baseball League. Major amateur team sports include field hockey, softball and rugby union.

With the exception of basketball, most professional Australian sports teams are community based and not privately owned.

tions have not formally entered the collective industrial relations law system, the mere threat has induced employers to recognise players' associations for the purposes of private collective bargaining.

What is driving this trend? It is almost too trite to say that the growing commercialisation of sport is doing this. Players are increasingly engaged only in their sport — it is their livelihood — and, not unnaturally, they wish to maximise the financial returns for their labours. On the other hand, the clubs and the sports associations need to contain their largest costs — wages. Hence, individual rights and interests must give way to the collective, commercial interests of the players and the clubs as in many other areas of commercial life. Collective bargaining is a natural consequence of these developments. The history of industrial relations shows that in market economies, where groups of workers within an organisation perform similar functions, collective organisation and negotiation will inevitably arise. It is perhaps surprising that it has taken so long for team sports to integrate into our society's entrenched traditions of union organisation and established systems of industrial relations law.¹²

The employment relationship is the springboard for the study of professional team sports law. In examining the withering of individualism in this relationship, our focus will be on the place of the athlete within the framework of legal regulation which exists and on trends towards recognition of collective interests. Our analysis will be divided into three parts. Part one will examine the individual legal rights and interests of athletes. This section will mainly be confined to analysis of common law rights.¹³ The second part will consider the intervention of statute upon common law rights and, in particular, how these provisions bolster the individual rights of players. Part three will consider the scope and role of collective labour relations law in relation to professional team sports — in particular, whether we are witnessing the end of individual contracting in this field and the scope for enterprise bargaining.

12. See H.B. Higgins, *A New Province for Law and Order*, 29 HARVARD L. REV. 13 (1915); 32 HARVARD L. REV. 189 (1919).

13. The focus of this analysis is on the *content* of the contract of employment. Issues concerning the *termination* of such contracts in team sports are beyond the scope of this paper, though good general accounts are to be found in JAMES J. MACKEN, GREG MCCARRY & CAROLYN SAPPIDEEN, *THE LAW OF EMPLOYMENT* (3rd ed. 1990) and BREEN CREIGHTON & ANDREW STEWART, *LABOUR LAW — AN INTRODUCTION* (1990).

I. INDIVIDUAL LEGAL RIGHTS AND INTERESTS

An initial issue concerns whether sport and work¹⁴ are incompatible in the sense that even though an athlete might be remunerated for playing sport, he or she is not "at work." One "plays" sport — the implication being that sport is something one does when not working. In this respect any remuneration from sport is incidental.¹⁵ Such has been the prevailing view. However, German sociologist Bero Rigauer has argued that elite sport has become a form of work in the adoption of work's regimented practices, terminology, organisational structures and aspirations.¹⁶ Competition, specialisation, achievement orientation and quantification, "scientific" approaches to improving performance and upward social mobility through success are common elements of both elite sport and modern forms of work. While not without its critics,¹⁷ Rigauer's work demonstrates that elite sport should no longer be regarded as fundamentally different from work.

This philosophical issue has been often linked to the distinctly legal question of whether a person engaged to play sport is capable of being employed under a contract of employment or some other legal arrangement. We said in our introduction that courts have been reluctant to find that paid athletes are engaged as employees. An illustration of this in Australia is the decision of Justice Hardie in *Elford v. Buckley*.¹⁸ Justice Hardie concluded that, having regard to the essentially voluntary nature of the New South Wales Rugby Football League¹⁹ at the time, the rules of the League which bound clubs in the League regarding the transfer of players did "not fall within the category of employment contracts . . . appropriate for the application of the doctrine of restraint of trade."²⁰ In essence, Justice Hardie held that a professional rugby league footballer was not really an employee.

14. In the sense of an occupation or activity from which a person derives a living in whole or part.

15. This receives some support from the part-time nature of most Australian professional team sports.

16. BERO RIGAUER, *SPORT AND WORK* (1969, English translation 1981).

17. E.g., Bob Stewart, *The Nature of Sport Under Capitalism and its Relationship to the Capitalist Labour Process*, 6 *SPORTING TRADITIONS* 43 (1989).

18. 2 N.S.W.R. 170 (1969).

19. New South Wales is an Australian State. Australia, like the United States of America, is a federation consisting of the federal government, six States (New South Wales, Victoria, Queensland, South Australia, Western Australia and Tasmania) and several Territories.

20. *Elford*, 2 N.S.W.R. at 177-78.

This case, however, was one which involved an attack upon the collective interests of the sport of rugby league in New South Wales.²¹ It is interesting to speculate on how courts may come to different conclusions in different contexts. In a 1909 case in England, the Court of Appeal held that an English professional soccer player was an employee.²² The case focused on the right of the player to claim workers' compensation for an injury suffered during a soccer match. The court seemed to have little difficulty concluding that the player was an employee. According to Lord Justice Farwell:

It may be sport to the amateur, but to a man who is paid for it and makes his living thereby it is his work. I cannot assent to the proposition that sport and work are mutually exclusive terms, or hold that the man that is employed and paid to assist in something that is known as sport is, therefore, necessarily excluded from the definition of workman within the meaning of the Act. I put during the argument the case of the huntsmen and whips of a pack of hounds. The rest of the field ride for their own amusement, but the three I have mentioned are employed by and obey the orders of the master, and risk their necks, not entirely for their own amusement, but because they are paid to do it.²³

One wonders whether the Court of Appeal would have come to the same conclusion if the sport concerned had been cricket. At that time, soccer was largely a working class game.²⁴

Nevertheless, in a manner consistent with Rigauer's perception of elite sport, *Buckley v. Tutty*²⁵ put the status of professional team athletes beyond doubt. The High Court of Australia²⁶ expressly overturned the decision of Justice Hardie in *Elford v. Buckley* stating that "the fact that football is a sport does not mean that a man paid to play football is not engaged in employment."²⁷ After quoting Lord Justice Farwell in *Walker*, the High Court added, "the position of a professional footballer vis-à-vis his club is that of employer and employee."²⁸

21. In the sense that it was alleged that the retention and transfer rules were in restraint of trade.

22. *Walker v. The Crystal Palace Football Club Ltd.*, [1910] 1 K.B. 87.

23. *Id.* at 93-94.

24. See also *Seymour v. Reed*, [1927] A.C. 554 and *Corbett v. Duff*, [1941] 1 K.B. 730.

25. 125 C.L.R. 353 (1971) (Austl.)

26. The High Court of Australia is Australia's supreme court. State Supreme Courts and the Federal Court of Australia stand below the High Court in the court hierarchy.

27. 125 C.L.R. at 372.

28. *Id.* The Court relied for this proposition on *Commissioner of Taxation (Cth) v. Madalena*, 45 A.L.J.R. 426 (1971).

While *Buckley v. Tutty* held that in a general sense professional team athletes are employees, it is useful to consider whether this will always be the case. There may be advantages for both players and clubs in categorising players as independent contractors. It is almost impossible for a professional team athlete to escape categorisation as an employee, at least in respect to sporting activities,²⁹ due to the nature and application of the legal tests distinguishing an employee from an independent contractor.

The approach of the Australian courts now is to consider the facts of the relationship against a range of indicia. The most important indicium concerns the extent of the employer's right to control the work performed under the contract. Other indicia include the following: the mode of remuneration, the provision and maintenance of equipment, the obligation to work, the hours of work and provision for holidays, the deduction or otherwise of income tax and the scope for delegation of work by the putative employee.³⁰

However, the most important indicium is clearly the right to control. The greater the right to control the work, the more likely it is that the relationship is one of employer and employee. The emphasis on the *right* to control, rather than the mere exercise of it, derives from a decision of the High Court. The decision, *Zuijs v. Wirth Bros.*,³¹ concerned whether skilled acrobats, engaged by an itinerant circus for an indefinite period at an agreed weekly sum to give an acrobatic display on the trapeze at each performance, were employees. An affirmative answer meant they were entitled to workers' compensation. The putative employers argued that since they did not exercise any control over the manner of performance of the acrobatic display, the control test was not satisfied. However, in a joint judgment, Chief Justice Dixon, and Justices Williams, Webb and Taylor held that the acrobats were engaged under contracts of employment because "what matters is [that there is] lawful authority to command so far as there is scope for it."³² The Court recognised that in the case of skilled employment, employers will rarely direct workers in the actual performance of those skills. Indeed, it may be impossible to do so. Nevertheless, a right to ultimately control the

29. It is of course possible for an athlete to be an employee for certain purposes and an independent contractor for other purposes. For instance, the athlete may be employed to play football, but be engaged as an independent contractor to perform promotional activities for the club.

30. *Stevens v. Brodribb Sawmilling Co. Pty. Ltd.*, 160 C.L.R. 16, 24 (1986) (Mason J., dissenting).

31. 93 C.L.R. 561 (1955) (Austl.).

32. *Id.* at 571.

manner of performance will be indicative of a contract of employment rather than a contract for services.

The express terms of professional team athletes' contracts usually include promises to play the sport whenever and wherever directed by the club, attend training sessions and carry out instructions of the coach. These terms put the issue of employment beyond doubt. Even if such things are not reflected in express terms, it is impossible to envisage professional team sports being played without them. They clearly would be implied terms in the contract.

Categorisation as an employee cannot be avoided simply by expressing the contract to be one between principal and independent contractor. In *Cam & Sons Pty. Ltd. v. Sargent*,³³ the High Court of Australia looked behind such an express term and decided that the nature of the relationship was one of employer and employee.³⁴

Accordingly, other than in exceptional circumstances,³⁵ professional team athletes will be employees rather than independent contractors.³⁶ The categorisation of the professional team athlete as an employee, pursuant to a contract of employment, has a number of implications for athlete and sports club. Some are advantageous to one or the other of them, some are not.

33. 14 A.L.J.R. 162 (1940).

34. See also *Narich v. Commissioner of Pay-roll Tax*, (NSW), 50 A.L.R. 417 (1983).

35. In *Hughes v. Western Australian Cricket Ass'n (Inc.)*, 19 F.C.R. 10 (1986), Toohey J. held the relationship between Perth district cricket club, Subiaco Floreat, (a minor league club playing in a league conducted entirely in Perth, Western Australia) and former Australian cricket captain, Kim Hughes, to be one of principal and independent contractor. Under his contract with the club, Hughes was not obliged to play in any particular match and he was paid on the basis of \$1.00 per run scored and \$50.00 per win.

36. See also *Commissioner of Taxation (Cth) v. Maddalena*, 45 A.L.J.R. 426 (1971), *Adamson v. West Perth Football Club (Inc.)*, 27 A.L.R. 475 (1979), *Bartlett v. Indian Pacific Ltd.*, 68 W.A.I.G. 2508, 2514 (1988) and *Adamson v. New South Wales Rugby League Ltd.*, 31 F.C.R. 242, 260 (1991) (special leave to appeal to the High Court of Australia refused 24 October 1991). However, arguments to the contrary arise occasionally: *Walsh v. Victorian Football League*, A.T.P.R. ¶40-422, 44,896 (1983) and *Barnard v. Australian Soccer Fed.*, 81 A.L.R. 51, 56 (1988). This demonstrates the factual nature of the issue.

It is arguable that athletes from the amateur or Olympic team sports who rely on government financial support through, for example, Australian Institute of Sport scholarships or Sports Talent Encouragement Plan grants, can be characterised as employees of the federal government according to the tests applied in the authorities discussed above. If so, their conditions of "employment" fall far short of acceptable community standards. For an investigation at length of this argument in the Canadian context, see ROB BEAMISH & JANE Q. BOROWY, *Q. WHAT DO YOU DO FOR A LIVING? A. I'M AN ATHLETE*. (1988).

*A. Implications of Categorisation as Contract of Employment**(1.) Vicarious Liability*

The employer is vicariously liable for the negligent acts of the employee performed in the course of employment. Vicarious liability can even extend to intentional torts such as battery. By contrast, a person engaging an independent contractor is not usually exposed to vicarious liability for the contractor's tortious behaviour.³⁷

The most common kind of harm which may expose an employer sports team to vicarious liability is physical injury inflicted on a fellow participant, or perhaps a spectator,³⁸ by the employee athlete in connection with playing the sport. It is well established that a player can incur personal liability for battery arising from deliberate fouls happening not only behind the course of play³⁹ but closely connected with it.⁴⁰ Of considerable interest are recent cases that have taken the tort of negligence into new fields by applying it to the contact or fast-action sports played at close quarters.⁴¹ Australian professional team sports fall within this description - even cricket and baseball, at least in regard to some aspects of their play. In brief, players owe fellow players a duty to take reasonable care for their safety while playing. Hence, in the football codes there is a duty to tackle carefully. This is not as outrageous as it first seems. The level of care required will usually be very attenuated because it must first be acknowledged that force and physical contact are permitted by the rules or are necessarily incidental to the play. Also, play is fast with little or no time for reflection. Reasonableness is judged in accordance with the circumstances of the sport. Most injuries, therefore, will continue to be inflicted without incurring legal liability. Nevertheless, an athlete will be answerable for objectively foolhardy conduct.

Whenever the athlete is liable for battery or for negligence, his or her employer will be vicariously liable if the athlete's wrongful conduct has been committed in the course of employment. Course of employment is defined as what is expressly or impliedly authorised or what is within the ostensible authority of the employee. The courts have given a wide meaning to the notion of "authority" (and, hence, a wide scope to vicarious liability) by declining to characterise much wrongful conduct as unauthorised,

37. It has been argued they should be. See Ewan McKendrick, *Vicarious Liability and Independent Contractors — A Re-examination*, 53 MODERN LAW REVIEW 770 (1990).

38. *Payne v. Maple Leaf Gardens Ltd.*, 1 D.L.R. 369 (1949).

39. *E.g.*, *Watherston v. Woolven*, 139 L.S.J.S. 366 (1987).

40. *E.g.*, *McNamara v. Duncan*, 26 A.L.R. 584 (1979), *Giumelli v. Johnston*, Aust. Torts Reports ¶81-085 (1991).

41. *Condon v. Basi*, [1985] 2 All E.R. 453, *Johnston v. Frazer*, 21 N.S.W.L.R. 89 (1990) (special leave to appeal to the High Court of Australia refused.)

preferring instead to describe it as merely unauthorised modes of performing authorised acts.⁴² This can extend to cases where express instructions are disobeyed.⁴³ For instance, a rugby league player told by his coach not to make any head-high tackles will nevertheless render his employer club vicariously liable by negligently injuring an opponent with such a tackle. Even a deliberate foul tackle may incur vicarious liability⁴⁴ in much the same way as bar staff or bouncers may make hoteliers or nightclub proprietors responsible for injuries deliberately inflicted on patrons.⁴⁵ If the battery is motivated by personal spite, or private dispute there will not be vicarious liability. However, a battery originating from some misguided attempt to advance or protect an employer's interests will have the opposite effect.⁴⁶ For example, a deliberate foul tackle intended to disable a leading opposition player in the hope of improving the chances of victory for the tackler's team will incur vicarious liability on the employer.

The employee remains responsible despite vicarious liability falling on the employer - their liability is joint and several. At common law, the employer is not obliged to indemnify or insure the employee against liability for torts committed against third parties in the course of employment. An employer held vicariously liable may recover from an employee. Two grounds have been advanced for this right of recovery: an implied contractual right of indemnity and the contribution legislation.⁴⁷ Some Australian jurisdictions have legislated to reverse the common law rule with the result that an employer is not entitled to contribution or indemnity from an employee for torts committed in the course of employment⁴⁸ and must indemnify the employee against personal liability.⁴⁹ Even in those jurisdictions

42. Hence, an employer cannot effectively guard against vicarious liability by stating that an employee is only authorised to perform functions without, say, negligence.

43. *Bugge v. Brown*, 26 C.L.R. 110 (1919) (Austl.).

44. *Rogers v. Bugden* (unreported, Supreme Court of New South Wales, Lee C.J., 14 December 1990; appeal pending); Dennis Boucher, *Club Liable for Player's Actions*, 1(1) ANZSLA NEWSLETTER 5 (1991).

45. *Deatons Pty. Ltd. v. Flew*, 79 C.L.R. 370 (1949) (Austl.).

46. *Poland v. John Parr & Sons*, [1927] 1 K.B. 236.

47. *Lister v. Romford Ice & Cold Storage Co. Ltd.*, [1957] A.C. 555. However, in *McGrath v. Fairfield Municipal Council*, 156 C.L.R. 672, 675 (1985), the High Court of Australia noted that *Lister*, although applied in lower courts in Australia, had "never been the subject of critical examination in this court."

48. Employees Liability Act 1991 (N.S.W.) § 3(1)(a); Wrongs Act 1936 (S.Austl. Act & Ord.) § 27C, and Law Reform (Miscellaneous Provisions) Act 1956 (Nth. Terr.) § 22A.

49. Employees Liability Act 1991 (N.S.W.) § 3(1)(b); Wrongs Act 1936 (S.Austl. Act & Ord.) § 27C(1)(b), and Law Reform (Miscellaneous Provisions) Act 1956 (Nth. Terr.) § 22A(1)(b).

Legislation in Tasmania requires an employer to insure an employee against liability to fellow workers, but not strangers; Workers Compensation Act 1988 (Tas.Sess.Stat.) § 97(1). However,

where the common law rule remains, its impact has been significantly nullified by federal insurance legislation.⁵⁰ An insurer is not entitled to be subrogated to a claim an insured employer may have against an employee for indemnity or contribution. The operation of the federal and the local legislation cannot be modified even by express agreement between team and athlete. However, the legislation does contain an important exception — where the athlete is guilty of “serious or wilful misconduct” or “serious and wilful misconduct”⁵¹ in the commission of the tort for which the employer is vicariously liable. These expressions are not defined in the legislation. Although they have been explored to some degree in the case law,⁵² they largely involve issues of fact. They presumably extend beyond instances where a player lands a blow well after a play because vicarious liability for an employer would be unlikely in those circumstances. Taking drugs which caused a player to behave carelessly or aggressively toward other players such that the likelihood or gravity of injury was substantially increased could constitute serious misconduct. Failure to follow instructions concerning safe training or playing practices might qualify. Conduct that constituted a criminal offence or warranted instant dismissal is often referred to as falling within the scope of the exception. However, courts should carefully confine the scope of the exception to especially serious transgressions otherwise the exception will overtake the rule. Indeed, the mere fact that a tribunal has imposed a suspension will not invoke the exception. A court must make its own assessment of the nature of the misconduct.⁵³ It is our view that many of the offences which come before sports disciplinary tribunals will not qualify.

the benefit of this requirement only applies to situations where the employer would have been obliged to pay workers' compensation to the injured employee, which is often not the case for professional team athletes; §§ 7, 25 and 97. Hence, a professional footballer who, while running onto a ground, negligently knocks over and injures a member of his team as well as an employee trainer is insured against personal liability to the trainer but not the team mate. This compounds the incongruity constituted by professional athletes' exclusion from workers' compensation schemes.

50. Insurance Contracts Act 1984 (Cth) § 66. Of course, an *uninsured* employer might be motivated to seek contribution or indemnity in those jurisdictions where that remains permitted.

51. Insurance Contracts Act 1984 (Cth) § 66 uses the former term and among the local legislation the closest to § 66 is Law Reform (Miscellaneous Provisions) Act 1956 (Nth. Terr.) § 22A(3) which refers to “serious and wilful, or gross, misconduct.” Employees Liability Act 1991 (N.S.W.) § 5 and Wrongs Act 1936 (S.A.) § 27C(3) refer to “serious and wilful misconduct” and therefore will be less likely to be invoked against an employee.

52. Boral Resources (Queensland) Pty. Ltd. v. Pyke, 93 A.L.R. 89 (1989). *See also* North v. Television Corp., 11 A.L.R. 599, 608-09 (1976); MACKEN et al., *supra* note 13, at 206-07; R.C. McCALLUM, MARILYN PITTARD & GRAHAM SMITH, AUSTRALIAN LABOUR LAW: CASES AND MATERIALS 136-43 (2d ed. 1990).

53. Hollington v. Hewthorn & Co. Ltd., [1943] K.B. 587 (Eng.C.A.).

(2.) Restraint of Trade

As an employee engaged in a "trade," a professional athlete will be able to rely upon the restraint of trade doctrine (*see below*).

(3.) Access to the Formal Industrial Relations System

Employees and their representative bodies will have access to the formal industrial relations system. Generally, industrial awards (analogous to collective agreements in the United States except that they have a quasi-legislative status) are only binding in respect of employees — not independent contractors.⁵⁴ Moreover, in most States and under federal industrial relations legislation, only associations of employees may register as industrial unions (*see below*).

(4.) Entitlement to Workers' Compensation

Given the foregoing characterisation of professional team athletes as employees, it comes as something of a surprise to learn that they do not have access to the workers' compensation system as a general rule. After all, the essence of workers' compensation schemes throughout the world is to provide no-fault compensation to people injured in the course of their employment. Yet in Australia, many people participating in sporting activities are specifically excluded from the scope of the workers' compensation schemes⁵⁵ even though they might be employees under the usual tests and derive the whole or the predominant part of their livelihood from playing sport.

Notwithstanding the moderately long history of workers' compensation legislation in Australia, the exclusion of professional athletes from the legislation is a relatively recent development. The changes concerning commercialism and professionalism to which we have referred caught up with sport in the workers' compensation arena in the mid-1970s. At that time decisions of courts and tribunals in Victoria and New South Wales highlighted the fact that a large number of people participating in sport did so as em-

54. *See Building Workers' Indus. Union v. ODCO Pty. Ltd.*, 99 A.L.R. 735 (1991); special leave to appeal to the High Court of Australia refused June 7, 1991.

55. *See* Workers Compensation Act 1987 (N.S.W.) § 3(1) definition of "worker" and clauses 9, 11 and 15 of schedule 1; Accident Compensation Act 1985 (Vic.) § 16; Workers' Compensation Act 1916 (Queensl.) § 3(1) definition of "worker" and § 3(3A); Workers Rehabilitation and Compensation Act 1986 (S.A.) § 58; Workers' Compensation and Rehabilitation Act 1981 (W.Austl.) §§ 11 and 11A; Workers Compensation Act 1988 (Tas.) § 7; Workers' Compensation Ordinance 1951 (A.C.T.) §§ 6(4A)-(4E); Work Health Act 1986 (N.T.) §§ 3(9)-(10).

ployees and were entitled to workers' compensation when injured.⁵⁶ Not surprisingly, sports administrators had been oblivious to this entitlement and did not have the required insurance in many cases. Indicative of the sports mystique, the community's response was to rush through amendments to remove employee athletes from the scheme of the legislation rather than to ensure that the workers' compensation coverage was put in place for them. However, the result is not uniform. Each jurisdiction has its own exceptions to the exclusion and these need to be watched carefully. This is not the place to describe them in detail. It is sufficient to illustrate the complexities by noting that in South Australia an athlete is not excluded if he or she derives an entire livelihood from playing sport or the income derived exceeds an indexed amount,⁵⁷ in Victoria there is no exclusion if the athlete is employed to do things in addition to playing sport,⁵⁸ and New South Wales provides a specialised sporting injuries insurance scheme.⁵⁹

The growth of national leagues and the changed circumstances surrounding modern professional team sports indicate the importance of removing present anachronistic arrangements in order to achieve uniformity of entitlements among athletes working in the same leagues.

(5.) Terms Implied into a Contract of Employment

The most obvious benefit to the clubs, as employers, of categorising the relationship as one of employer and employee is that the relationship will be governed by a host of wide and flexible obligations known as implied terms. Of course all contracts contain implied terms, but contracts of employment contain more (particularly to benefit the employer) than other forms of contract. We will outline the nature and the content of terms commonly implied in contracts of employment below.

(6.) Restrictive Trade Practices Provisions of the Trade Practices Act

Another advantage of the categorisation as employees rather than independent contractors is that relations between players and clubs are less likely to be regulated by the pro-competitive provisions of the Trade Prac-

56. *E.g.*, *Bailey v. Victorian Soccer Fed'n*, [1976] V.R. 13; *Smith v. Dandenong Football Club*, 5 W.C.B.D. (Vict.) 98 (1977); *Peckham v. Moore*, [1975] 1 N.S.W.L.R. 353.

57. In 1991, this amount was \$35,800; *Workers Rehabilitation and Compensation Act 1986* (S.Austl.) § 58(2).

58. *Accident Compensation Act 1985* (Vict.) § 16(1). Thus, a professional footballer who is also employed by the club as its public relations officer would be entitled to WorkCare for on-field as well as off-field injuries.

59. *Sporting Injuries Insurance Act, 1978* (N.S.W.).

tices Act.⁶⁰ Although the Act outlaws a wide range of anti-competitive practices affecting, *inter alia*, the supply of goods and services, the definition of "services" does not include the performance of work under a contract of service,⁶¹ that is, an employment contract. So far this has been the major stumbling block to Act-based challenges to league rules⁶² concerning transfers⁶³ and the draft.⁶⁴ The significance of this factor is highlighted by *Hughes v. Western Austl. Cricket Ass'n (Inc.)*⁶⁵ where unusual circumstances meant the relationship between club and athlete was one of principal and independent contractor - not employer and employee - with the ultimate result that the Act was successfully invoked by the player.

It has been argued that the contract of employment is capable of division into component parts, *namely*, performance of work by the employee on one hand and the "club's performing its functions to enable . . . [the player] to receive the benefits he would get from playing" on the other,⁶⁶ and that it is only the former which has been excluded from the definition of services in the Act.⁶⁷ However, a slightly different but related argument was rejected in *Adamson v. West Perth Football Club (Inc.)*⁶⁸ and elsewhere it has been held that "the only services supplied under a [contract of service] are the performance of work by the employee for the employer."⁶⁹ The position now seems settled by the decision of the Full Court of the Federal Court of Australia in *Adamson v. New South Wales Rugby League*⁷⁰ which has blown these straws away in the wind.⁷¹

60. Trade Practices Act 1974 (Cth), Part IV - Restrictive Trade Practices. These provisions owe a substantial portion of their jurisprudential basis to United States antitrust law, in particular the Sherman and Clayton Acts, although there are significant differences. As indicated elsewhere in this paper, the Australian legislation, with one irrelevant exception, does not impact on labour relations law.

61. *Id.* at § 4(1).

62. However, there may be other possibilities for the challenger to invoke the Act. *See* Walsh v. Victorian Football League, A.T.P.R. ¶40-422 (1983); Carfino v. Australian Basketball Fed'n Inc., A.T.P.R. ¶40-895 (1988).

63. *Adamson v. West Perth Football Club (Inc.)*, 27 A.L.R. 475 (1979).

64. *Adamson v. New South Wales Rugby League Ltd.*, 31 F.C.R. 242 (1991) (special leave to appeal to the High Court of Australia refused 24 October 1991).

65. 19 F.C.R. 10 (1986).

66. *Barnard v. Australian Soccer Fed'n*, 81 A.L.R. 51, 56 (1988) (Pincus J).

67. *Id.*

68. 27 A.L.R. 475, 506 (1979)(Austl.). Here, an argument that the "right or privilege to enter into a contract of service did not come within the exclusive provision of the definition" was rejected.

69. *Wright v. TNT Austl. Pty. Ltd.*, 15 N.S.W.L.R. 662, 674 *per* Lee J. (1988).

70. 31 F.C.R. 242 (1991) (special leave to appeal to the High Court of Australia refused 24 October 1991).

71. *Id.* at 259-63 *per* Wilcox J., Sheppard and Gummow JJ. agreeing.

(7.) Assignment

Although the employer's right to receive the benefit of the contract of employment is not assignable in the way many other legal interests are assignable,⁷² it is possible to include an express term permitting assignment in a written employment contract.⁷³ Such a term may be critical to a club wishing to trade players, or to a club owner seeking to sell the club. The players may be the major asset. However, substantial difficulties could be expected in enforcing performance under the assigned contract.⁷⁴

B. Rights and Duties Arising Under the Contract of Employment

Terms may be implied into a contract in two different ways. One of these ways is commonly called 'implication by law' which means that the terms are implied into the contract regardless of the actual intention of the parties. The second is the implication of a term which is necessary, in the circumstances of a particular case, to give business efficacy to the contract.⁷⁵ Both types of implied terms may be excluded by an express term in the contract to the contrary although it is arguably more difficult to exclude, in this manner, a term implied by law. The terms implied by law into a contract of employment are more extensive than terms implied into other forms of contract.⁷⁶ Moreover, these terms provide the employer with a powerful tool to control the conduct of employees. This is enhanced in the case of professional athletes by the vague nature of their duties, the public role inherent in the duties and the widespread view that a strict disciplinary regime is necessary for successful performance of the duties.

While there are numerous duties which the law will automatically imply into contracts of employment,⁷⁷ we will confine discussion to those few which have particular relevance to professional team sports.

72. *Nokes v. Doncaster Amalgamated Collieries Ltd.*, [1940] A.C. 1014, *Denham v. Midland Employers' Mutual Ltd.*, [1955] 2 Q.B. 437.

73. *Denham v. Midland Employers' Mutual Ltd.*, [1955] 2 Q.B. 437, 443, *Bartlett v. Indian Pacific Ltd.*, 68 W.A.I.G. 2508, 2515-16 (1988).

74. See the discussion of the enforcement of positive and negative covenants below.

75. *Castlemaine Tooheys Ltd. v. Carlton and United Breweries Ltd.*, 10 N.S.W.L.R. 468, 486-87 *per Hope J.A.* (1987), *Codelfa Construction Pty. Ltd. v. State Rail Auth. of New S. Wales*, 149 C.L.R. 337, 345-46 *per Mason J.* (1982), and *MCCALLUM et al.*, *supra* note 52, at 52-53.

76. Although there is some debate about this, see *Adrian Brooks, Myth and Muddle - An Examination of Contracts for the Performance of Work*, 11 UNI. N.S.W.L.J. 48 (1988).

77. See generally *CREIGHTON & STEWART*, *supra* note 13, at 95-144, *MCCALLUM, PITTARD & SMITH*, *supra* note 52, at 49-111 and *MACKEN et al.*, *supra* note 13, at 89-143.

(1.) Obedience of Orders

The most important is the duty to obey lawful and reasonable orders. In essence, this requires employees to obey orders which both fall within the scope of their contracts of employment and are reasonable. Where athletes are involved, it may often be difficult to determine the scope of the contract and the factor of reasonableness may have to be judged against the expectations of the community about what is reasonable in the context of the sport itself.

The scope of the contract may be defined by reference to professional obligations. Authority supports the proposition that professional obligations are to be implied into contracts of professional employment and, therefore, the employees have a *contractual* duty to obey directions which come within those professional obligations. The standards contained in these professional obligations are those set by both the profession itself and by public expectation.⁷⁸ Our reference to "professionals" is not confined to the traditional notion of "the professions" (such as the medical and legal professions). In occupations that have unwritten but well established expectations of conduct and performance — including elite athletes — these expectations constitute professional obligations which fall within the scope of the athlete's contract of employment. These obligations may be both positive and negative. For instance, an order by a coach that an athlete either refrain from behaviour which will interfere with on-field performance or do things which will enhance such performance will generally be valid under this duty. This may include directions to maintain a particular diet, to not have sex the night before the game (provided it could be proven that having sex may adversely affect on-field performance⁷⁹), to wear certain types of clothing or footwear and to play games at particular venues and times. Directions to take prohibited or potentially dangerous performance-enhancing drugs could be lawfully refused,⁸⁰ as could a direction to do something illegal.⁸¹

(2.) Cooperation

There also may be a duty to cooperate in the sense that an athlete has a positive duty to help or cooperate in the functioning of the club and in

78. See generally *Sim v. Rotherham Metro. Borough Council*, 3 W.L.R. 851, 870-77 (1986). In this case, school teachers were held to be "professionals."

79. For a light-hearted examination of this issue, see Brent Crosswell, *Sex Before the Game* in R. Fitzgerald, & K. Spillman, *THE GREATEST GAME* 55 (1988).

80. See *The Ottoman Bank v. Chakarian*, [1930] A.C. 277.

81. For example, to assault an opponent. See also *Kelly v. Alford*, [1988] 1 Qd. R. 404.

promoting its success.⁸² In the context of team sports, this duty would require active cooperation in the implementation of team plans, perhaps even to suggest better ones. The duty could also extend to ensuring smooth and efficient transportation arrangements to and from games.

(3.) Good Faith

Analogous to the duty of cooperation is the duty of fidelity or good faith. The term "duty of fidelity or good faith" is a broad term which covers a range of obligations owed by an employee intended to ensure that honest and faithful service is rendered to the employer. The range of obligations encompass the implied duties of loyalty, honesty, confidentiality and mutual trust. An employee will breach this duty by engaging in conduct that is in opposition or conflict with the employer's interests⁸³ or which is destructive of the necessary confidence between employer and employee. In the context of sport, active disruption of team planning or encouraging defiance of the coach would infringe the duty. Moreover, it would seem that the duty requires an employee to tell the truth, perhaps even to a disciplinary tribunal!⁸⁴ It may also be a breach of the duty if an athlete discloses, for instance to the media, a secret team plan or strategy or, even, that there is dissension within the club about some action taken or proposed. Clearly, industrial action by team athletes would infringe the duty.⁸⁵

(4.) Care and Competence

An employee also owes a duty of care and competence. This duty is sometimes divided into two separate duties; namely, a duty to exercise skill and a duty to exercise reasonable care. The duties have their origins in the 19th century case of *Harmer v. Cornelius*.⁸⁶

The duty of skill, in the context of professional team sports, is an implied warranty that the player has the skills which he represents to the Club as having and that the player will exercise those skills with reasonable competence. In other words, if an Australian Rules football player says he can kick a football equally well with his left or right foot, but he cannot kick

82. See generally MCCALLUM et al., *supra* note 52, at 61-65.

83. E.g., *Orr v. Univ. of Tasmania*, [1956] Tas. S.R. 155 and *Re Transfield Pty. Ltd.*, [1974] A.R. (N.S.W.) 596.

84. Especially if the disciplinary rules of the league are incorporated into the contract of employment (see below).

85. See *Miles v. Wakefield Metro. Dist. Council*, A.C. 539 (1987), though see MCCALLUM et al., *supra* note 52, at 139-40.

86. 5 C.B. N.S. 236 (1858); 141 E.R. 94.

with the left foot at all, there will be a clear breach of the duty.⁸⁷ In such a case, the breach will probably be sufficiently serious to permit the employer to terminate the contract. The obligation to exercise reasonable care would require a player to be careful not to injure other players during training or a game — including opposing players — and, perhaps, even to break up a fight between players or to assist injured players.⁸⁸

(5.) Employer's Duty to Act Reasonably or in Good Faith

The common law contract of employment automatically imposes a number of obligations upon employers. One such obligation is particularly important to the degree of discipline (and often punishment) to be imposed upon players. This obligation involves the employer's duty to act reasonably or in good faith. It is analogous to the employee's duty of fidelity. The duty requires that an employer will not conduct itself in a manner likely to damage or destroy the relationship of confidence and trust between the parties as employer and employee without reasonable cause.⁸⁹ Thus, if a coach without reasonable cause humiliates a player in front of the other players, there is a *prima facie* breach of contract. Berating players, exhorting them to greater efforts and pointing out their failings - even vehemently - is permissible. Degrading them or constant criticism (if unjustified), such that the destruction of their own self-confidence results, is outside the bounds of acceptable conduct.

(6.) Remuneration

Another duty imposed upon employers is the duty to pay reasonable remuneration. In the absence of an express term as to the rate of remuneration, a reasonable rate could usually be determined by reference to prevailing rates of pay for that type of work in the industry.⁹⁰ Since an express term in a player's service contract will override an implied term, the rate of pay actually agreed in the service contract will prevail. Difficulties arise where a player is injured or ill and where a player is suspended by the

87. The duty usually extends to requiring the player to disclose any injury which inhibits relevant athletic performance. In combination with the duty of honesty, this produces a continuing obligation of disclosure, although as a practical matter, the club will usually monitor such matters and thereby be independently informed.

88. See *Sim v. Rotherham Metro. Borough Council*, [1986] 3 W.L.R. 851, 873. See also *Occupational Health and Safety Act 1985* (Vict.) § 25.

89. See *Bliss v. S.E. Thames Regional Health Auth.*, [1987] I.C.R. 700, 714; *Marlborough Harbour Bd. v. Goulden*, [1985] 2 N.Z.L.R. 378, 383; *Lock v. Westpac Banking Corp.*, No. 5447 of 1990 (Unreported, Supreme Court of New South Wales, Wadden C.J. in Eq., 26 August 1991, 31).

90. See *McCALLUM et al.*, *supra* note 52, at 76.

employer for disciplinary reasons. If there is no express term as to the remuneration of a player while unable to play due to injury or illness, the likely result is that the player will be entitled to the normal rate of remuneration indefinitely or at least until the contract can be lawfully terminated.⁹¹ There is no implied right for an employer to suspend an employee for disciplinary reasons connected with the manner of performance of the player's contract. Examples of this are late arrival at training or failure to wear the club uniform at official functions. The employer's remedy, if in fact there has been a breach of contract, is to sue for damages for such breach. If a player refuses to play or impedes the performance of his or her side of the contract, the club may be entitled to set off from any wages payable an amount equal to the damage it has suffered.⁹² A player who is wrongly suspended by a club may sue for damages for breach of contract.⁹³ It is imperative, therefore, that clubs wishing to impose disciplinary suspension upon players should include express terms to that effect in the service contracts with the players.

If they do so, they should take particular care in relation to the disciplinary penalties. A common law rule — the rule against penalties — provides that pre-agreed contractual damages must be a genuine pre-estimate of the damage likely to flow from the breach of contract.⁹⁴ Thus, if a club has a rule providing that a player who is late for training will automatically have deducted a set amount of money from wages by way of a fine, this will probably infringe the rule against penalties. On its face, the fine will be the same regardless of whether the player is five minutes late or one hour late. The rule is that the fine is void and the player could respond by suing the club for any amount wrongly deducted. In order to avoid infringing the

91. *Id.* 84-86, *Paff v. Speed*, 105 C.L.R. 549, 566 (1961), and *Graham v. Baker*, 106 C.L.R. 340, 344-46 (1961)(Austl.). In most cases lawful termination could be effected by giving the contractually agreed notice of termination or otherwise by giving "reasonable notice." There is no doctrine of "termination at will" operating in Australian employment law.

92. *See Sim v. Rotherham Metro. Borough Council*, [1986] 3 W.L.R. 851; *Austl. Bank Employees' Union v. Nat. Austl. Bank Ltd.*, 31 I.R. 436 (1989); *Zamperoni Decorators Pty. Ltd. v. Lo Presti*, [1983] V.R. 338.

93. *Hanley v. Pease and Partners Ltd.*, [1915] 1 K.B. 698, 705, *Devonald v. Rosser and Sons*, [1986] 2 K.B. 728, 742 and *Re Application by Bldg. Workers' Indus. Union of Austl.* 41 F.L.R. 192, 194 (1979).

If a league tribunal wrongly suspends a player and the club acts on the suspension by not paying wages for the suspension's duration, an action for breach of contract against the club could be a useful way of collaterally attacking the suspension. Normally, though, direct proceedings against the league to restrain the enforcement of the suspension will be more appropriate except where a court would refuse jurisdiction because the suspension had already been served.

94. *Pigram v. Attorney-General for New South Wales*, 132 C.L.R. 216 (1975) (Austl.), *Amos v. Comm. for Main Roads*, 6 I.R. 293 (1984); *Arleshiem Ltd. v. Werner*, [1958] S.A.S.R 136, 140-41.

rule, there must be an element of discretion in the determination of the fine to be imposed. The discretion should be phrased in a way which suggests that the amount of the fine will be referable to the seriousness of the breach. Wider sporting association disciplinary provisions could also infringe this rule where those rules are incorporated into the individual contracts of employment of the players.⁹⁵

(7.) Contractual Duty of Care

An employer owes his or her employees an implied *contractual* duty of care. This duty will usually be enforceable as a wider statutory duty under occupational health and safety legislation.⁹⁶ In *Cotter v. Huddart Parker Ltd.*, Chief Justice Jordan described the employer's duty of care:

The special duties which are owed to an employee . . . arise by virtue of implications in the contract of employment. They comprise the duties to ensure, so far as is possible to do so by the exercise of reasonable care, (1) that the persons selected to work with him as his fellow employees are competent, (2) that the premises at which he is to work, and the appliances in use there, are safe, and (3) that the general system of working which is in use is also safe.⁹⁷

Thus, a club may be under a duty to its employees to prevent a player known to be unduly violent, or even reckless or routinely negligent in his or her play, from training or playing.⁹⁸ Subject to the medical evidence, the duty will oblige a club to remove players from a game or training if they are concussed or bleeding.⁹⁹ Ensuring that the premises are safe may include providing appropriate padding on goal posts, eliminating dangerous objects around the boundary of the field and (depending on the circumstances) keeping spectators off the playing surface until the athletes have departed. The duty to provide a safe system of work would include an obligation to ensure that safe practices are followed during training - in particular, that

95. As to incorporation, see below.

96. See Occupational Health and Safety Act 1985 (Vict.) § 21 and Occupational Health and Safety Act, 1983, (N.S.W.) § 15.

97. 41 N.S.W.St.R. 33, 37-38 (1941).

98. This may extend to the club being obliged to refuse to play against sides with players with known violent or dangerous propensities, or at least to pressure the league or opposing club to take action against such players.

99. To prevent the possible transmission of human immunodeficiency virus ("HIV") and other infectious diseases. There is at least one reported incident of HIV being transmitted through a collision in soccer, 335 *The Lancet* 1105 (1990); see also Alan Sullivan, *The Legal Liability of the Player and of His Club* 6, paper presented on May 19, 1991 to The Law of Professional Team Sports Conference conducted by the Australian and New Zealand Sports Law Association Inc. and The Univ. of Melbourne Law School Continuing Education Program.

training periods are not excessive in duration or intensity so as to endanger a player's health.¹⁰⁰

There is no reason of principle why the system of "work" ought not to include the playing rules of the sport. Thus, the club has an obligation to ensure that those rules are reasonably "safe." Often the power to fix the playing rules rests with the sports association, not the club individually, and a fair concern is that the club ought not be held accountable for matters over which it lacks real control. The likely response of the law is to impose an obligation to refuse to field a team if the rules constitute an unsafe system. No doubt this is an unenviable dilemma for the club: risk legal liability for injury to the player or incur the fury of the league if there is resistance within the league to rule change. A legal approach is unhelpful and less likely to achieve the objective of improving safety because there will arise some cases where employer clubs will prefer to avoid the league's fury. A possible solution lies in the imposition of responsibility on the league. The imposition would have to be a general duty under the tort of negligence at common law because the league will not usually be the employer of the players. In any event, the sports associations risk severe criminal penalties under occupational health and safety legislation with respect to playing rules that are not as "safe" as is "practicable" regardless of whether they employ any of the players.¹⁰¹ An example of this problem is found in the interchange rules of the football codes. There have been a number of reported incidents of injured players being returned to play because a team had exhausted its interchange bench. An amendment of the rules to allow for more interchange players to take the field in the event of injury would remove the pressing practical temptation to continue with injured players. While primary responsibility must rest with the club for endangering its already injured players,¹⁰² we suggest that sports associations cannot afford to turn a "Nelsonian eye" at least for reasons of the legislation.¹⁰³

The employer's duty of care is a non-delegable duty. If an employer engages an independent contractor (such as a chiropractor or physiotherapist), the employer will be liable to the player for any injury negligently caused or aggravated by the independent contractor. This liability is not a vicarious liability as commonly understood. Rather, the independent con-

100. *Johnstone v. Bloomsbury Health Auth.*, [1991] 2 All E.R. 293.

101. *E.g.*, Occupational Health and Safety Act 1985 (Vict.) § 22.

102. This responsibility could even extend to liability for exemplary damages. For an extraordinary example from Canada, see *Robitaille v. Vancouver Hockey Club Ltd.*, 124 D.L.R. (3d) 228 (1981).

103. See also *Legal Threat to AFL on Injuries*, THE AGE (Melbourne), May 14, 1991.

tractor's wrongful conduct is a direct breach of the employer's non-delegable duty to the employee.¹⁰⁴ Thus, the employer's duty is one not only of taking reasonable care itself and through its employees but of also being responsible for the negligence of independent contractors.

(8.) Duty to Indemnify

An employer has a contractual duty to indemnify an employee for expenses properly incurred by the employee in and about carrying out his or her duties.¹⁰⁵ Unless there is an express term in the service contract to the contrary, a club may be liable to pay the costs of an operation or medical treatment which the employee requires in order to continue playing. This would not necessarily be confined to operations and medical treatments related to injuries and conditions arising from the sport. For instance, a "constitutional" health problem may not normally impede other forms of working lifestyle but might restrict sporting performance. Medical costs incurred to rectify the problem would be recoverable by virtue of the implied term because they would be unnecessary apart from the demands of the sport employment.

(9.) Duty to Provide Work

The final duty to which we will refer is the employer's duty to provide work. In most areas of employment an employer's duty extends no further than an obligation to provide remuneration. There is no duty to actually provide work.¹⁰⁶ However, there are exceptions to this principle. Some employees have remuneration in the form of a commission and some employees in the entertainment industry can demand under their employment contracts to be given work of a particular kind to perform. The latter exception is premised on the concept that the entertainers be given an opportunity to exercise and display their talents is implicit in their employment contract.¹⁰⁷ If not put to use before the public's eye, talent and reputation quickly fade. It is our view that since professional team athletes have similarly ephemeral careers, they will generally come within this exception. Unless there is an express term in the contract to the contrary, a player who is ready, willing and able to perform at the agreed level has a contractual

104. *Kondis v. State Trans. Auth.*, 54 C.L.R. 672 (1984) (Austl.).

105. *See McCALLUM et al.*, *supra* note 52, at 108.

106. *Forbes v. New S.Wales Trotting Club Ltd.*, 143 C.L.R. 242, 260-61 (1979) (Austl.), *Hughes v. West Austl. Cricket Ass'n (Inc.)*, 19 F.C.R. 10, 52 (1986) and, *see generally* *McCALLUM et al.*, *supra* note 52, at 102-05.

107. *Marbe v. George Edwardes (Daly's Theatre) Ltd.*, [1928] 1 K.B. 269, *White v. Australia and New Zealand Theatres Ltd.*, 67 C.L.R. 266 (1943) (Austl.).

right to do so. Accordingly, in *Bartlett v. The Indian Pacific, Ltd.*, Commissioner Fielding said:

It is very much the part of a professional footballer's lot that he have playing exposure in order to enhance his reputation and so presumably further his career. A footballer who sits in the audience ceases to be a footballer.¹⁰⁸

In that case, Commissioner Fielding found that a footballer contracted to play with the West Coast Eagles (who traded as Indian Pacific Ltd. and was entered in the Victorian Football League) had been entitled to treat himself as dismissed from his employment when he was left off the Club's player list — even though the club continued to pay for his services. According to the Commissioner:

Being on the list of players afforded him exposure in his trade which would not otherwise be available. He no longer had an opportunity to display his talents in the VFL competition, an opportunity to which it seems most professional footballers aspire.¹⁰⁹

The Commissioner awarded the footballer \$8,500 in compensation for denied contractual benefits.¹¹⁰ By being left off the player list the player was "constructively dismissed" from the West Coast Eagles, and the \$8,500 represented the difference between what he could have received if he had been able to continue playing in the VFL competition and what he would receive for playing in the Western Australian Football League for the duration of his contract (as he was otherwise obliged to do).

C. *Incorporation of Terms*

Apart from terms described above which are automatically implied into the contract by operation of law,¹¹¹ often other terms will be incorporated into the contract "by reference." These may be incorporated either expressly or impliedly.¹¹² A typical example of express incorporation is to be found in the following clauses of the standard Australian Football League ("AFL") Playing Contract:

2. The Player shall for the term of this Contract:
 - 2.1 . . .

108. 68 W.A. Indus. Gaz., 2508, 2517 (1988).

109. *Id.* at 2517.

110. Under § 29(b) of the Industrial Relations Act 1979 (W.A.), the Western Australian Industrial Relations Commission is able to decide whether an employee has not been allowed by his employer a benefit to which he is entitled under his contract of service.

111. Subject to any contrary intention of the parties.

112. *E.g.*, *Alexander v. Standard Tel. & Cables Ltd.* (No. 2), [1991] I.R.L.R. 286, 291-92; *Marley v. Forward Trust Group Ltd.*, [1986] I.C.R. 891; *Gregory v. Philip Morris Ltd.*, 80 A.L.R. 455, 479 (1988); *Camden Exhibition & Display Ltd. v. Lynott*, [1966] 1 Q.B. 555.

2.6 Obey all Rules and Regulations, Resolutions and Determinations of the Club and abide by the Memorandum and Articles of Association of the Club.

7. The Player and the Club agree with the AFL to comply with and observe the Rules and Regulations of the AFL, the Player Rules, the Memorandum and Articles of Association of the AFL and any determinations or resolutions of the AFL Commission which may be made or passed prior to or at any time after the execution of this Contract

By this device the contract incorporates the contents of all of the rules and documents referred to as varied from time to time. Thus, for instance, the Rules and Regulations of the AFL which empower the imposition of discipline for certain breaches of the Rules of the Game, become terms of the contract of employment. Accordingly, if a player breaches these Rules of the Game on the field, he is not only responsible under them but also usually breaches the contract of employment.¹¹³

Another issue concerning implied terms arises from contractual provisions such as Clause 18 of the AFL Playing Contract:

This Contract embodies all of the terms of the Agreement between the parties save for the Rules and Regulations, Player Rules, Memorandum and Articles of Association of the AFL, the determinations or resolutions of the AFL Commission, and the Memorandum and Articles of Association and Rules of the Club by which the Player has agreed to be bound. Each party acknowledges that no representation has been relied upon in entering into this Contract which has not been referred to herein and the terms hereof shall not be varied except by an instrument in writing signed by each of the parties hereto.

Does the statement that the contract embodies "all of the terms of the Agreement between the parties" exclude the various implied terms to which we have referred? The answer is probably no. This is because such implied terms would usually have to be expressly excluded or an inconsistent provision made. It could also be argued that the clause excludes terms implied to give business efficacy to the contract, but this is unlikely to succeed.¹¹⁴ The clause is probably only intended to prevent any two parties¹¹⁵ from amending the contract without the consent of the third party, and this is why it

113. See generally ROGER RIDEOUT, *RIDEOUT'S PRINCIPLES OF LABOUR LAW* 32-34 (4th ed. 1983).

114. See generally *Castlemaine Tooheys Ltd. v. Carlton and United Breweries Ltd.*, 10 N.S.W.L.R. 468, 490-92 (1987).

115. The AFL Playing Contract usually has three parties: the AFL, the Club and the Player.

goes on to provide that "the terms hereof shall not be varied except by an instrument in writing signed by each of the parties hereto."¹¹⁶

D. Express Terms

An express service contract between a player and club serves two purposes. First, it adds certainty to the contract in the sense that it defines the terms of the relationship more clearly than if reliance were placed solely on the terms implied by the common law. Second, a service contract creates and specifies obligations and duties which would not otherwise exist at common law.

The express terms contained in a service contract will usually impose positive and negative obligations, that is, the player agrees to do some things and not to do other things. We will deal shortly with the question of how and to what extent these terms are enforceable. But before doing so it is necessary to consider the changing nature of such contracts and their importance in sport.

Until the 1960s, express service contracts were rare. The few in existence tended to be individualised and negotiated between the club and its more outstanding professional players. Terms were few and related primarily to remuneration. The remaining legal obligations between the player and the club derived from two separate sources. First, common law implied terms (which we have discussed above) were relied on to some extent. Second, and more importantly, the rules of the sporting association governed the allocation of players between clubs, among other things. These rules have taken various forms. They have included geographic zoning rules allocating a player to a club by place of birth or place of residence at a specified age, and rules prohibiting the transfer of players between clubs without permission of the last club to which the player was allocated or only on payment of a transfer fee to that club. Sometimes these rules were incorporated into the player contracts by reference, often they were made between clubs and the league only — but with significant effect on players.

Challenge to restrictive player allocation practices began in earnest with *Eastham v. Newcastle United Football Club Ltd.*¹¹⁷ *Eastham* held that a professional soccer player was engaged in a trade and that the "retain and transfer" rules of the English professional soccer leagues infringed the restraint of trade doctrine. *Eastham* was first applied in Australia by the

116. Clause 18 is strengthened by an administrative requirement of the AFL that an officer of the Club and the Player each complete a statutory declaration that there have been no amendments to the Playing Contract.

117. [1964] 1 Ch. 413 (England).

High Court of Australia in *Buckley v. Tutty*.¹¹⁸ Other cases have followed,¹¹⁹ but for present purposes the most significant of these cases was *Foschini v. Victorian Football League*.¹²⁰ In that case Justice Crockett made it clear that he thought that the best solution for sports clubs if they were to seek some form of security of tenure over their players was to move towards a contract system. He said:

Fundamentally why the present system in Australia is the monolithic system that it is is because it confers on clubs throughout the country "title" to every footballer without any reciprocal obligation's [sic] being placed upon a club. The club is not obliged to transfer the player even though it is unprepared to play him or pay him or to enter into a contract with him. Contracts with players are becoming increasingly common. They appear generally to be honoured by both sides. To introduce their general use would seem to present the best prospect of solving the present problem of competition for players operating in conflict with the permit and clearance rules.¹²¹

The era from *Eastham* to *Foschini* was one during which the law clearly favoured the legal individualism of players over the perceived collective interests of professional leagues. It was indeed a golden era of individualism. A free agent could hold out for the highest bidder. Any attempt by his previous club to enforce the restrictive league rules on player movements could be despatched with the threat of legal action alleging restraint of trade. Club managements obsessed with "buying premierships" engaged in "cheque book warfare" with their opponents. Even so, only the more highly skilled free agents could take full advantage of this open market philosophy. Also, it took a brave player to risk the wrath of management and the prospect of legal costs. However, because of sporting associations' fear that a court would declare their rules to be unlawful as in restraint of trade most such actions or even threats of actions were settled in favour of the players.

E. The Shift Toward Collectivism

Foschini represented a high-water mark for this legal individualism. Although the move to individual contracting recognised by Justice Crockett

118. 125 C.L.R. 353 (1971) (Austl.).

119. *E.g.*, *Carfino v. Austl. Basketball Fed'n Inc.*, A.T.P.R. ¶40-895 (1988); *Hall v. Victorian Football League*, [1982] V.R. 64; *Adamson v. West Perth Football Club (Inc.)*, 27 A.L.R. 475 (1979).

120. 1982 No. 9868, V.S.Ct. (April 15, 1983).

121. *Id.* at 25.

was strengthened by his decision, within the past few years there has been a reversal in the balance of interests between individualism and collectivism. We have identified this occurring in four principal ways.

1. The recent successful legal challenge in *Adamson v. New South Wales Rugby League Ltd.*¹²² to the League's internal player draft was a product of unprecedented *collective* action initiated by the Rugby League Players' Union.¹²³

The internal player draft in that case, as well as the current draft system in the AFL, owe much of their origins to the judgment of Justice Crockett in *Foschini*. Justice Crockett favoured the proposition that one means of ensuring that the poorer clubs had better access to talented players was to expand and institutionalise the then limited draft of interstate players in the Victorian Football League.¹²⁴ A draft can take various forms, but its guiding principle is that the pool of players not contracted to clubs ("free agents") are available to clubs in reverse order to each club's place in the previous year's competition. Hence, the last place team has the first selection and so forth. Over time the best players are evenly spread across the teams, or so the theory holds.¹²⁵ The ultimate objective is an even competition in which outcomes of matches are unpredictable. This is said to maximise spectator interest and increase revenues. Hence, the economic welfare of the league, clubs and players is maximised.¹²⁶

In *Adamson v. N.S.W. Rugby League Ltd.*, a large number of players from the 16 clubs in the New South Wales Rugby League ("NSWRL") challenged the internal draft which allocated between clubs those players who, after their contracts had expired, failed to reach a new agreement with their respective employing clubs. After losing at the trial of the action, the plaintiff players obtained a unanimous verdict from the Full Court of the Federal Court of Australia that the internal draft was an unreasonable restraint of trade and, therefore, void.

122. 31 F.C.R. 242 (1991) (special leave to appeal to the High Court of Australia refused October 24, 1991).

123. See below for an outline of the Union's background.

124. 1982 No. 9868, slip op. at 25, V.S.Ct. (April 15, 1983).

125. However, the theory can be doubted at least for the reason that it assumes teams have equal access to information concerning the best draft picks.

126. For an example of a fuller statement of this theory of professional team sports economics see Owen Covick, *Sporting Equality in Professional Team Sports Leagues and Labour Market Controls: What is the Relationship?*, 2(2) *Sporting Traditions* 54, 55 (1986).

In our view, this case will come to be recognised as the beginning of a new era in the organisation of professional team sports in Australia. While from one perspective it merely continues the success which players had experienced in challenging rules restricting player independence to select employers,¹²⁷ it is the first determined collective legal challenge by players to the authority which team and league management purport to exercise over them. Past challenges were individual affairs, although often promoted by disaffected clubs. On this occasion the Union was of crucial significance to the processes of stimulating and managing the court action. An individual player would have experienced great difficulty in funding the litigation and assembling the evidence¹²⁸ for a successful challenge.¹²⁹ It is also highly likely that an individual player would have been deterred by the unfavourable decision of the trial judge, namely, that although the draft acted as a restraint of trade of professional rugby league players, it was reasonable and therefore lawful. Indeed, a union is more likely to take a broader and longer term perspective when pursuing a claim whereas an individual's decision about litigation will be much more governed by personal and immediate considerations.

The intervention and success of the Union will no doubt strengthen and embolden its dealings with the NSWRL in the future. Also, the case serves as a precedent for other player associations. The AFL Players' Association is negotiating a new collective agreement with the AFL. The prospect that the Association might challenge the AFL's draft system (which is similar to the NSWRL's void system in many significant respects) has no doubt encouraged the AFL to enter into genuine negotiations on a wide range of player grievances previously left unaddressed.

Indeed, to the extent that future restraints may become collectively bargained between management and players rather than imposed unilaterally by management, the courts may come to take a

127. See also *Nobes v. Australia Cricket Bd.*; [1992] Australian Current Law Reports 175 V.R. 2; Steven Wright, *Nobes Hits Australian Cricket Board for Six*, 1(4) ANZSLA NEWSLETTER 1 (1991).

128. Among other things, this case showed the court how a variety of players were affected by the draft rules.

129. This may be one reason why an individual challenge to the AFL's draft wilted shortly after it was commenced in December 1991. See *Challenge to AFL Draft Abandoned*, 1(4) ANZSLA NEWSLETTER 3 (1991).

different approach to deciding the restraints' validity. We will return to this aspect towards the end of this paper.

2. The second way in which legal individualism has declined since *Foschini* has been through the increasing standardisation of player contracts. During the 1980s, most major professional team sports developed standard form contracts required to be signed by every player. The impact of this development on individualism can be better assessed by comparison with the major professional leagues of the United States. The use of standard form contracts in those leagues has been widespread for many years. However, the standard form is regarded as a core set of minimum terms designed to avoid exploitative labour practices. A minimum salary is usually specified. Players, therefore, use the standard as a starting point from which to negotiate their individual contracts. By contrast, the limited experience of standard forms in this country has been almost as a code of terms not to be varied. All that is open for negotiation are remuneration and duration.¹³⁰ Given that in, say, the AFL the overwhelming majority of players have contracts of one year's duration with an option for a further year, there is no minimum salary and each club has a league-imposed salary cap within which the player's remuneration must be accommodated, there is quite limited scope for individual bargaining.
3. The salary cap, used by the AFL, NSWRL and the National Basketball League, is another mechanism aimed at evening the competition through eliminating "cheque book warfare." By limiting the total amount individual clubs can pay their players, wealthier clubs are precluded from buying or retaining disproportionate numbers of the best players. While this measure is a further instance of collectivism asserting itself over individualism, it is not wholeheartedly supported. A number of the AFL clubs, usually the more successful ones, have publicly and privately criticised this "football socialism." Interestingly, the salary cap was not challenged in *Adamson v. New South Wales Rugby League Ltd.* While the cap received prominent mention in the case, the Court was careful not to pronounce upon its validity.¹³¹
4. In two cases decided in the late 1980s, the Victorian courts exhibited a quite vigorous approach toward the enforcement of negative

130. We make this comparison to highlight the nature of the Australian experience. The explanation for the difference seems to rest in a complex mix of social and economic factors.

131. See, e.g., 31 F.C.R. 242, 249 (1991) (Sheppard, J.).

covenants in player service contracts. Traditionally, the courts have allowed great scope to individual liberty by refusing to take action which might directly or indirectly compel the performance of service contracts. Thus, a player could refuse to fulfill his or her obligation to play for a club, commence with another club and leave the original club only with its remedy of suing for damages. However, by giving new scope to indirectly compelling the performance of contracts, these Victorian cases favoured employers over employees in a way which can be viewed as somewhat surprising. This development will be discussed at some length in the next section. While it is clearly a movement away from individualism, it is not necessarily one toward collectivism. Even so, it does substantially underpin the collectivist approach to player contracting which now prevails in the leagues (which approach has been fuelled by the clubs' desires to achieve the control over player movements which the restraint of trade doctrine has denied them).

We believe that these developments have made the growth of collective bargaining within professional team sports inevitable. This growth may ultimately lead to the entry of sporting industrial relations into the mainstream industrial relations system. There is already evidence of this with the recent registration of the former New South Wales Rugby Players' Association as a union under the Industrial Arbitration Act 1940 (N.S.W.).¹³²

*F. The Enforcement of Positive and Negative Covenants*¹³³

(1.) Positive Covenants

Positive covenants or positive obligations include all of the promises of a player to do particular things. For instance, to obey all reasonable directions of the coach or to play in all football matches and so on. Not infrequently, disputes will arise between a player and a club over either the performance of obligations within the club (for example, to attend training) or over a desire on the part of the player to play for another club. In what circumstances will a court order the player to carry out his or her positive obligations?¹³⁴

In general, a court will not enforce such positive obligations. Contracts of employment are personal contracts and the courts have long been loathe

132. This development is investigated further below.

133. See generally Gel Furness, *Injunctions and the Contract of Employment*, 2 AUSTRALIAN JOURNAL OF LABOUR LAW 234 (1989).

134. Our emphasis on orders for compliance with positive and negative covenants should not be taken as suggesting that advisers overlook damages as a possible remedy.

to specifically enforce them because to do so would turn them into "contracts of slavery" and often place unduly onerous, if not impossible, responsibilities on the courts in regard to the contracts' supervision.¹³⁵ Indeed, until recently, there was a rule against specific performance of contracts of employment.¹³⁶ However, in Australia there is no longer any such rule and the courts will consider as a matter of discretion whether such an order should be granted.¹³⁷ It is clear that such an order will be exceptional and is likely only to be granted where the employment relationship is somewhat impersonal. Thus, such an order may be granted where the employer is a large organisation or large corporation and the employee who is ordered to perform his or her contract will not necessarily be required to work with persons with whom they cannot get along. In other words, there may be other parts of the organisation or corporation in which the employee can work.

In the case of a small organisation, like a sports club, where good personal relations and discipline are paramount, it is difficult to see a court making an order which requires continued personal service.¹³⁸

It may be possible for a club to indirectly enforce a positive obligation by obtaining an injunction against the third party (for instance, another club) seeking to persuade the player to break a contract of employment with the club. However, the recent decision of the English Court of Appeal

135. This concern about supervisory responsibilities has been criticised in *Turner v. Australasian Coal & Shale Employees' Fed'n*, 55 A.L.R. 635 (1984).

136. *Ridge v. Baldwin*, [1964] A.C. 40, 65; *J.C. Williamson v. Lukey & Mulholland*, 45 C.L.R. 282, 297-98 (1931) (Austl.).

137. *Turner v. Australasian Coal and Shale Employees' Fed'n*, 55 A.L.R. 635, 648-49 (1984); *Gregory v. Philip Morris Ltd.*, 80 A.L.R. 455, 481-82 (1988); *Reilly v. State of Victoria*, Unreported Supreme Court of Victoria, Smith J., November 20, 1991.

138. It is interesting to note that industrial tribunals may adopt a similar approach to the question of reinstatement of unfairly dismissed athletes. Thus, Commissioner Fielding said in *Bartlett v. Indian Pacific Ltd.*, 68 W.A.I.G. 2508, 2518 (1988):

Even if the dismissal was unfair, as the Applicant claims, I would not be minded to exercise the discretion vested in the Commission to order that he be reinstated into the Respondent's list of players. It might well be in the best interests of the Applicant to reinstate him but football is a team game. The team does not train solely for the benefit of individual players. Rather, the players who make up, or have the potential to make up, the team practise together so as to improve their skills in order that they might be better utilised in combination with those of the others in the team and the team thereby prosper. In those circumstances to insist that a player be retained in the training squad in the face of objections from the coach and team selectors and where there is no prospect of him playing for the team seems to me to have an air of unreality about it. It undermines the basic concept of a team game and, I suspect, has the potential to undermine the team's performance if nothing else. There needs to be some degree of reality about the enforcement of industrial laws of this kind; not a blind adherence to academic principles.

in *Warren v. Mendy*¹³⁹ seems to have largely closed this legal option. In that decision the Court said:

[We] are all of the opinion that the court ought usually to refuse the grant of an injunction against a third party who induces a breach of the contract if on the evidence its effect would be to compel performance of the contract. If that were not so, the master could . . . obtain by the back door relief which he could not obtain through the front.¹⁴⁰

The enforcement of positive obligations thus presents particular difficulties for sports administrators. As the scope of such obligations is expanded by express terms in player contracts¹⁴¹ their enforcement will present even greater difficulties. We will no doubt see more litigation on this topic.

(2.) Negative Covenants

Most modern standard form player contracts include express negative covenants. Typically, they oblige the player, at the very least, not to play professionally in the relevant sport for another club in the same association or league. For instance, the NSWRL Playing Contract provides that the player will "not play in any Rugby League Football match other than for the Club or in a representative match sanctioned or approved by the League or the Australian Rugby League (except with the express prior written consent of the Club)."¹⁴² The AFL Playing Contract is even more explicit and detailed. Clause 2. provides:

The Player shall for the term of this Contract:

- 2.7 Not play or train for Australian Rules football with any other club, company, person or entity fielding a team or teams in the AFL Competition or any other Australian Rules football competition or any exhibition or promotional match.
- 2.8 Not enter into any contract, agreement, arrangement, understanding or option to play football for any other club, company,

139. [1989] 3 All E.R. 103.

140. *Id.* at 539. Compare the quite different facts of *World Series Cricket Pty. Ltd. v. Insole*, [1978] 3 All E.R. 449, where the players wished to stay with the first employer (World Series Cricket) and a declaration was obtained by the employer against the third party declaring unlawful its interference with that relationship. As a practical matter such declarations are obeyed and it becomes unnecessary to seek an injunction. See also *TCN Channel Nine Pty. Ltd. v. Northern Star Holdings Ltd.*, AUSTL. INDUS. LAW REVIEW ¶ 298 (1990).

141. For instance, by clauses such as the New South Wales Rugby League's Playing Contract Clause 3.(1)(e) to "undergo drug testing if and when requested to do so by the Club". See also Richard Johnstone, *Pre-employment Health Screening: The Legal Framework*, 1 AUSTL. J. OF LAB. L. 115 (1988).

142. Clause 3(1)(h).

person or entity without first obtaining the written consent of the Club.

- 2.9 Not enter into any discussions, negotiations, contract, agreement, arrangement, understanding or option which would prevent the Player or which gives the Player or any other club, company, person or entity the right to prevent the Player from complying with any of the provisions of this Contract. Nothing in this sub-clause 2.9 shall prevent the Player from engaging in commensurate secular employment or business.

Other clauses in the AFL Playing Contract oblige the player not to engage in any dangerous or hazardous activity that may affect the ability of the player to perform his obligations under the contract.¹⁴³ Further clauses require the player not to commercialise his identity, presumably so that the Club and the AFL can maintain some global control over commercial marketing of the sport.¹⁴⁴

Such negative covenants are generally expressed to operate only during the life of the contract. In other words, they are not post-employment restraints on the employee's ability to trade¹⁴⁵ and should be distinguished from the cases discussed above relating to restrictions - such as transfer rules - on a player's freedom to choose an employer. Accordingly, it is difficult to argue that they infringe the restraint of trade doctrine.¹⁴⁶

143. Clause 2.12 provides that the Player shall:

Not engage in any dangerous or hazardous activity which in the reasonable opinion of the Club may affect the Player's ability to perform his obligations under this Contract without first obtaining the consent of the Club, which consent shall not be unreasonably withheld.

144. The Player shall:

2.14 Not enter into any contract, arrangement or understanding to promote the Player's name, photograph, reputation, likeness and identity as an Australian Rules football player or endorse any product or service in trade or commerce by means of advertising the fact that the Player is an AFL footballer or a player of the Club, without first obtaining the consent of the Club which consent shall not be unreasonably withheld.

2.15 Not to permit or allow the name, photograph, likeness, reputation, and identity of the Player to be used in any way in connection with or in relation to any goods or services without first obtaining the consent of the Club which consent shall not be unreasonably withheld.

145. As to post-employment restraints, see MICHAEL J. TREBILCOCK, *THE COMMON LAW OF RESTRAINT OF TRADE* 62-151 (1986); Philip Sales, *Covenants Restricting Recruitment of Employees and the Doctrine of Restraint of Trade*, 104 *LAW QUARTERLY REVIEW* 600 (1988) and *Howard F. Hudson Pty. Ltd. v. Ronayne*, 126 C.L.R. 449 (1972) (Austl.).

146. *Esso Petroleum Co. Ltd. v. Harper's Garage (Stourport) Ltd.*, [1968] A.C. 269, 294; *William Robinson & Co. Ltd. v. Heuer*, [1988] 2 Ch. 451, 455. However, there is growing recognition that there exists a limited range of circumstances where the restraint of trade doctrine may be applied to strike down unreasonably restrictive contractual terms notwithstanding that the employment contract is current - see *A. Schroeder Music Publishing Co. v. Macaulay*, [1974] 3 All E.R. 616, *Watson v. Prager*, [1991] 1 W.L.R. 726 and *Michael I. Yanover & Harvey G.*

Nevertheless, courts rarely enforce such negative covenants in contracts for personal services.¹⁴⁷ The reason is a fear that enforcement will result in specific performance of the contract by the "back door." The classic statement of principle as to the limited circumstances in which a court will restrain a breach of a negative covenant is the dictum of Justice Branson in *Warner Bros. Pictures Inc. v. Nelson*:

The conclusion to be drawn from the authorities is that, where a contract of personal service contains negative covenants the enforcement of which will not amount either to a decree of specific performance of the positive covenants of the contract or to the giving of a decree under which the defendant must either remain idle or perform those positive covenants, the Court will enforce those negative covenants; but this is subject to a further consideration. An injunction is a discretionary remedy, and the Court in granting it may limit it to what the Court considers reasonable in all the circumstances of the case.¹⁴⁸

These principles give a court some latitude to restrain a breach of a negative covenant. There is considerable subjectivity in determining whether, in respect of particular facts, an order will or will not amount to specific performance, or whether the defendant will remain idle or pursue some other occupation.

In Australian professional team sports, where standard contracts contain negative covenants such as those outlined above, the scope of these principles assumes considerable importance. Will a court restrain a player from contracting with and/or playing with another team? This question was answered rather emphatically by the Supreme Court of Victoria in two decisions in 1987.¹⁴⁹ In *Buckenara v. Hawthorn Football Club, Ltd.*¹⁵⁰ Justice Crockett (whom it will be remembered was the judge in *Foschini*) ordered that the Hawthorn footballer, Gary Buckenara, be restrained for a two-year period from playing football with any football team in the Victorian Football League, other than Hawthorn. The judge found that Hawthorn had a contractual right to the player's services for those two years and that it could thus rely upon negative covenants in his contract similar

Kotler, *Artist/Management Agreements and the English Music Trilogy: Another British Invasion?*, 9 LOYOLA ENTERTAINMENT L.J. 211 (1989).

147. For recent judicial analysis of the cases concerning this issue see *Warren v. Mendy*, [1989] 3 All E.R. 103.

148. [1937] 1 K.B. 209, 217. See also *Lumley v. Wagner*, 1 De G.M. & G. 604 (1852), 42 E.R. 687 (1852).

149. See also *North Adelaide Football Club v. Riley*, No. 724 of 1984 S.Austl. S.Ct., Greg Griffin, *Life in the A.F.L. 'Days of Swine and Roses'*, 12 L. Soc'y. BULL. 132, 134 (June 1990).

150. [1988] V.R. 39.

to those quoted above in the AFL standard contract. However, the judge decided to restrain Buckenara only from playing with other teams in the VFL for the duration of his contract with Hawthorn. Crockett reasoned that Buckenara would not be forced to remain idle because he could, if he wished, play in other professional football leagues, such as the Western Australian Football League. In that respect, only part of the negative covenant was enforced. Of considerable significance is the judge's recognition of the "legitimate commercial interests" of the Club and of his desire to uphold the contract system.¹⁵¹ *Buckenara* marks a weakening of the bargaining position of the individual player and a corresponding strengthening of the collective and commercial interests of the club and sports association.

The day before Justice Crockett's decision in *Buckenara*, Justice Tadgell gave an equally important judgment in *Hawthorn Football Club Ltd. v. Harding*.¹⁵² Harding, like Buckenara, was intent on avoiding a contractual obligation to play for Hawthorn. However, the order made by Justice Tadgell went further than the order in *Buckenara* in that Harding was restrained for three seasons "from playing or agreeing with any person to play football for reward in Victoria or elsewhere for any football club other than" Hawthorn. The only obvious significant factual difference between Harding and Buckenara was that Harding had another profession (that of a dental technician) to which he could have turned if he chose not to continue to play football with Hawthorn. Buckenara, on the other hand, had no particular employment skills other than football. Thus, Buckenara could have been idle if the full force of the negative covenant had been applied to him, whereas Harding had the possibility of other pursuits even if prevented from playing professional football at all. Justice Tadgell, like Justice Crockett, was also concerned about protecting the commercial interests of the Hawthorn Football Club, in particular the \$25,000 signing fee paid to Harding by Hawthorn. Justice Tadgell likened the signing bonus to an investment in the defendant.

If the defendant were to be free, in breach of his contract with the plaintiff, to play football with a football club anywhere in Australia without the plaintiff's permission, the plaintiff's investment would be likely to be unprotected. It is, in my opinion, an investment which the plaintiff is entitled to attempt to protect.¹⁵³

We consider that these decisions go much further than would have been thought possible from many of the earlier cases and in so doing have

151. *Id.* at 43.

152. [1988] V.R. 49.

153. *Id.* at 62.

strengthened the movement away from individualism to collectivism. Indeed, recent English decisions have been very much more conservative.¹⁵⁴ For instance, in *Evening Standard Ltd. v. Henderson*,¹⁵⁵ the Court of Appeal restrained a breach of a negative covenant for one year, but only on the basis that the employer was prepared to continue to pay the employee without insisting that the employee perform any services under the contract.

The remarkable aspect of *Buckenara* and *Harding* is not so much that the courts were willing to grant injunctions, but the length of time for which the restraints were to operate. The overwhelming number of English cases has resulted in restraining orders (if any) of very short duration.¹⁵⁶ The notable exception is *Warner Bros. Pictures, Inc. v. Nelson*, where the restraint could have lasted for up to three years - comparable to the duration of orders in *Buckenara* and *Harding*. However, *Nelson* concerned the great actress Bette Davis at the height of her career. Her value to Warner Bros. measured in terms of her uniqueness as an international star and the substantial damage the corporation might suffer if she could provide her talents to a competitor, perhaps justified a lengthy restraint. By that stage of her career, she was probably a person of substantial wealth and quite capable of enduring the effect of an injunction for a short period since she could look forward to a relatively long career. The balance of hardship was very much in favour of Bette Davis. By contrast, neither *Buckenara* nor *Harding* were superstars of their sport. They were two of many good players. Indeed, *Harding* was yet to play in the AFL.¹⁵⁷ *Buckenara* was nearing the end of his career and less able to endure the effect of an injunction.¹⁵⁸ Each player appears not to have had substantial independent wealth. While Hawthorn may have had some difficulty in finding comparable substitute players in the short term, it is hard to maintain that it would have been irreparably damaged if the injunctions were not granted and that the balance of hardship was clearly against the club.

Nevertheless, an argument might be made for professional team athletes such as *Buckenara* and *Harding* to be restrained for a maximum of one season. We foresee at least two difficulties with that argument. First, the

154. These are conveniently collected in *Warren v. Mendy*, [1989] 3 All E.R. 103.

155. [1987] I.C.R. 588.

156. See *Warren v. Mendy*, [1989] 3 All E.R. 103.

157. *Harding* was described by Tadgell as a "potential star attraction," but *Harding's* career has proved only moderately successful. Given that predictions about the prospects of "new recruits" in team sports are notoriously unreliable, it may be wiser for courts to avoid having to weigh the merits of the (self-justifying) predictions of sports administrators by declining to grant restraining injunctions.

158. This factor, however, contributed to his not being restrained from playing Australian Rules football in other competitions.

strong view espoused by the courts has been an unwillingness to, in effect, compel an employee to specifically perform a personal service contract by means of the court enforcing a negative covenant that the employee not work for others. Hence, in *Buckenara* and *Harding* the courts were preoccupied with determining whether the professional footballer would have had other employment opportunities and thereby avoid being idle if restrained from playing football for other clubs. This approach by the courts is quite blinkered. It ignores completely the nature of the elite athlete. That nature contains an extremely powerful desire to compete and achieve at the highest level. Within days of the judgments, both *Buckenara* and *Harding* had compromised their differences with Hawthorn and played in the 1987 VFL season for that club. There is no doubt that the judges' orders were tantamount to directions to play for Hawthorn and this will almost inevitably be so in similar cases.

Second, the injunction is an equitable remedy and, as such, is discretionary. A factor indicating against the exercise of the discretion is the availability and adequacy of alternative remedies. Damages is one alternative.¹⁵⁹ The contract measure of damages aims to put the innocent party in the same position as if performance had been rendered. It can be argued that any such calculation is speculative in that it is exceedingly difficult to assess the worth to a sports team of a key position player in terms of the effect of the players' absence on spectatorship and sponsorship.¹⁶⁰ In some respects, the elite athlete may be considered unique. However, Australian courts have not been deterred from endeavouring to calculate damages in comparable circumstances in other contexts or at least from stating that a measure of damages can be calculated.¹⁶¹ The fact that damages may be difficult to calculate is not a justification for stating that damages are an inadequate remedy or for favouring the exercise of the discretion. Drawing an analogy from the *prima facie* measure of damages for non-delivery of goods, we suggest that an adequate *prima facie* measure for the innocent club is the difference between the amount which the innocent club would have paid and the amount which the player is to receive from his or her new club.¹⁶²

159. For a recent decision applying *Bucknara v. Hawthorn Football Club Ltd.*, [1988] V.R. 39, but refusing to grant an injunction because, among other things, damages were an adequate remedy, see *Film House Pty. Ltd. v. Silverstein*, ACL Rep 165 Vic 1 (1991).

160. *E.g.*, *Hawthorn Football Club Ltd. v. Harding*, V.R. 49, 60 (1988).

161. *E.g.*, *Callaghan v. Wm C. Lynch Pty. Ltd.*, N.S.W.R. 871, 877 (1962); *Oldcastle v. Guinea Airways Ltd.*, S.A.S.R. 325 (1956); *Fink v. Fink*, 74 C.L.R. 127, 143 (1946) and *Howe v. Teefy*, 27 N.S.W.St.R. 301, 307 (1927).

162. Additional amounts could be included, such as the cost of engaging a replacement player.

Indeed, this is the player's "market value."¹⁶³ Hence, an injunction to restrain a breach of a negative covenant ought not to be granted. In this approach we foresee further advantages. The policy of protecting contractual bargains is advanced because the player will not be financially advantaged by breaching his or her bargain. On the other hand, the player is not at risk of being indirectly forced to continue to play with a club against his or her will by virtue of the injunction enforcing the negative covenant and can play elsewhere to satisfy the myriad of reasons that might prompt a bona fide desire to change clubs; for example, geographical proximity to family, compatibility with coach and teammates and career advancement.

II. STATUTORY RESTRAINTS ON THE CONTRACTUAL RIGHT AND DUTIES OF THE PARTIES

It has long been recognised that the law of contract wrongly presupposes equality of bargaining power between the contracting parties. Accordingly, significant statutory modifications have been made to the common law in a variety of forms. The courts also have developed common law doctrines which recognise potential inequality; for instance, through principles which will allow contracts to be avoided due to duress or unconscionability in their formation.¹⁶⁴

Statutory provisions which might provide a player relief from unfair or unconscionable behaviour by an employer may be divided into two categories. First, statutes concerning industrial relations. Second, there have been suggestions from time to time that general provisions aimed at unconscionable conduct in connection with the supply of goods and services in trade or commerce¹⁶⁵ might be relevant to employment contracts. Such an application now seems unlikely due to the exclusion of employment contracts from the definition of "services" in such legislation (see above).¹⁶⁶ Accordingly, we will focus on the industrial relations legislation.

In some States, legislation permits employees to claim that they have been unfairly dismissed and an appropriate industrial tribunal, if it finds that the dismissal was unfair, may either reinstate the dismissed employee or award compensation. In most States, virtually any employee may make

163. See discussion of this notion in a slightly different context in *Miles v. Wakefield Metro. Dist. Council*, A.C. 539, 560 (1987) (Templeman, L.).

164. See, e.g., PETER HALL, *UNCONSCIONABLE CONTRACTS AND ECONOMIC DURESS* (1985).

165. E.g., Trade Practices Act 1974 (Cth) § 52A and Fair Trading Act 1985 (Vict.) § 11A.

166. There may also be difficulties in satisfying the requirement that the conduct occurred "in trade or commerce;" see *Concrete Constructions (N.S.W.) Pty. Ltd. v. Nelson*, 92 A.L.R. 193 (1990), c.f. *Barto v. GPR Management Serv. Pty. Ltd.*, A.T.P.R. ¶41-162 (1992).

such a claim;¹⁶⁷ in others the employee must be a member of a union or have his or her claim brought by a union.¹⁶⁸ The latter is also essentially the position under the federal Industrial Relations Act of 1988. The provisions and the jurisdictional issues surrounding them are complex and it is not the occasion to discuss them here.¹⁶⁹ However, an illustrative example is *Bartlett v. Indian Pacific Limited*.¹⁷⁰

Glen Bartlett entered into a contract with the Western Australian Football League ("WAFL")¹⁷¹ in February 1987 to perform services as a professional Australian Rules footballer for three years. Under the contract, his services could be contracted to what was designated "the New Club" (subsequently named the West Coast Eagles) or to any WAFL club. Upon the formation of the Eagles (which was incorporated as Indian Pacific Ltd.), Bartlett's services were assigned to that club which included him on its player list. Such inclusion was a pre-condition to him being selected to play. He played some games for the Eagles during the 1987 Victorian Football League season, but was dropped the following year from the player list without any warnings that his performance was regarded as unsatisfactory.

Bartlett applied to the Western Australian Industrial Relations Commission alleging that he had been unfairly dismissed and sought, among other things, reinstatement. In a decision rich in analysis of wide-ranging issues affecting sports law, Commissioner Fielding found that Bartlett had not been unfairly dismissed. Importantly, his decision reflects the astuteness of industrial tribunals to the realities, customs and practices applying in industries over which they exercise jurisdiction. The Commissioner stated that in considering the fairness or otherwise of the dismissal of a

167. See Industrial Relations Act 1991 (N.S.W.) §§ 245-55; Industrial Relations Act 1990 (Queensl.) § 11.11; Industrial Relations Act 1972 (S.Austl.) § 31 and Andrew Stewart, *UNFAIR DISMISSAL IN SOUTH AUSTRALIA* (1988); Industrial Relations Act 1979 (W.Austl.) §§ 23(1) and 29(b) and M. Brown, *The Demise of Compensation as a Remedy for Unfair Dismissal in Western Australia: A Casualty of the Robe River Dispute*, 19 *UNI. W.A.L.R.* 29 (1989). Between 1983 and 1990, Victoria was essentially an "individual rights" jurisdiction by virtue of Industrial Relations Act 1979 (Vict.) § 34 (see John Benson et al., *The Impact of Unfair Dismissal Legislation in the Victorian Jurisdiction*, 2 *AUST. J. OF LAB. L.* 141 (1989), but the decision of the High Court of Australia in *Downey v. Trans Waste Pty. Ltd.*, 99 *A.L.R.* 402 (1991) has restricted the right to claim unfair dismissal to employees covered by Victorian industrial awards only.

168. See Industrial Relations Act 1984 (Tas.), § 29 together with the definition of "industrial dispute" in § 3(1). See generally A.P. Davidson, *Reinstatement of Employees by State Industrial Tribunals*, 54 *AUSTL. L.J.* 706 (1980).

169. See also MCCALLUM et al., *supra* note 52, at 359-402, and CREIGHTON & STEWART, *supra* note 13, at 159-70.

170. 68 *W.A.I.G.* 2508 (1988).

171. In 1987 the WAFL acquired an expansion franchise in the Victorian Football League (now the Australian Football League). The WAFL continues to conduct its Perth-based competition among its member clubs but the best players compete in the AFL for the WAFL.

professional team athlete, it has to be accepted that the future of their employment has a degree of uncertainty which other vocations do not possess. Public support for a club, and subsequently the commercial revenue attracted to the club, depends on success in competition. Difficult selection decisions therefore must be made and it is "very much the part of a professional sportsman's lot to be subject to the vagaries of team coaches and selectors."¹⁷² Thus, the Commissioner concluded:

In this case the evidence is that the decision to dismiss the Applicant was made after a review of his playing performances and after undergoing various trials. The decision was based on performance, or perceived lack of it, by those who one would ordinarily expect to make such decisions for the West Coast Eagles and I cannot think that this was either an unreasonable or irrational approach. [I]t is not the Commission's function in claims of unfair dismissal to put itself in the position of the manager of the business and to determine the fairness or otherwise of a dismissal on the basis of what it would have done had it been the manager or team selector. Rather, its function is to determine fairness on the basis of an objective standard of reasonableness. It would be intolerable if every time a footballer was not selected in a team, or for inclusion in a playing squad, he could come to the Industrial Relations Commission to overcome the vagaries of the particular coach or selection committee. The Commission is simply not qualified to act as a selector in that way. I have been unable to find any instances of industrial laws relating to unfair dismissals having extended into the area of sporting team selections to the extent that the Applicant suggests it should on this occasion and I would be surprised if it did. It may be that different considerations might apply in cases involving dismissals unrelated to player performances.¹⁷³

In New South Wales, professional athletes can also rely upon Section 88F of the Industrial Arbitration Act 1940 (N.S.W.). Section 88F provides:

- 88F. (1) The Commission may make an order or award declaring void in whole or in part or varying in whole or in part and either ab initio or from some other time any contract or arrangement or any condition or collateral arrangement relating thereto whereby a person performs work in any industry on the grounds that the contract or arrangement or any condition or collateral arrangement relating thereto -
- (a) is unfair, or

172. *Id.* at 2517.

173. *Id.* at 2157-58.

- (b) is harsh or unconscionable, or
- (c) is against the public interest. Without limiting the generality of the words "public interest" regard shall be had in considering the question of public interest to the effect such a contract or a series of such contracts has had or may have on any system of apprenticeship and other methods of providing a sufficient and trained labour force, or

In *Sulkowicz v. Paramatta District Rugby League Club Ltd.*,¹⁷⁴ Justice Sweeney held that a professional rugby league player came within the New South Wales Industrial Commission's jurisdiction under this section. He held further that the player's contract with the Club was unfair and "very one-sided in favour of the Club and against the player."¹⁷⁵ The Club was entitled under the contract to in effect terminate it at any time by not "grading" Sulkowicz. That, together with the circumstance that Sulkowicz had not been given notice of this entitlement during particular negotiations, prompted Sweeney to declare the contract void and to order the Club to pay to the player \$13,000. Although not expressly mentioned, it is perhaps significant that Sulkowicz would have otherwise undertaken a substantial amount of pre-season training without payment.

In *Adamson v. New South Wales Rugby League Ltd.*,¹⁷⁶ the relationship between Section 88F and the common law doctrine of restraint of trade was considered briefly. Justice Hill concluded (at the trial) that as a general proposition if the player draft did not contravene the common law doctrine because it was a *reasonable* restraint, it would not run foul of Section 88F on the basis of it being unfair.¹⁷⁷ But as the Full Court of the Federal Court pointed out,¹⁷⁸ Section 88F could not in any event apply to the draft rules because they affected a player only at the expiration of his contract. It is only the terms of the player contract during its subsistence which attract the operation of the section. Since evidence on that aspect had not been adduced in regard to the actual effect on individual players, no conclusion could be reached in relation to the section's application.

III. COLLECTIVE LABOUR RELATIONS AND SPORTS LAW

In our introduction we remarked upon the trend toward collective organisation and collective bargaining in professional team sports in Austra-

174. 4 I.R. 272 (1983).

175. *Id.* at 278.

176. 31 F.C.R. 242 (1991) (Austl.).

177. He regarded "unfairness" as a wider concept than "harshness" or "unconscionability."

178. 31 F.C.R. 242, 264 (1991) Wilcox J. (Sheppard and Gummon JJ., agreeing).

lia. We have also made reference to the introduction, in recent years, of standard form player contracts and how this has tended to provide a focus for the common industrial interests of team athletes. What is surprising is that professional team sports have taken so long to enter the mainstream industrial relations system, especially when Australia has a comparatively high rate of unionism and a high-profile industrial relations system.¹⁷⁹

In Australia, sports unionism is a comparatively recent phenomenon.¹⁸⁰ Indeed, in most sports representative associations are not formally registered under industrial relations legislation. Industrial award coverage (which is the formal outcome of bargaining within the institutional system of industrial relations) of sports players is also largely unknown. It is interesting to note that similar professions such as actors and musicians have been unionised and have had award coverage for many years. Why has sport remained outside the institutional industrial relations system? Part of the answer may be found in decisions of the High Court of Australia about the kinds of occupations which can be unionised and thus participate in the federal industrial relations system. Until its repeal in 1988, the Conciliation and Arbitration Act 1904 (Cth)¹⁸¹ provided in Section 132 that only associations of employees whose members were either employed "in or in connection with any industry" or who were "engaged in an industrial pursuit" could register as federal trade unions. The concept of an "industry" or an "industrial pursuit" derived in part from the High Court's interpretation of Section 51(xxxv) of the Australian Constitution. Section 51(xxxv) provides that the federal Parliament may make laws with respect to:

51(xxxv) Conciliation and arbitration for the prevention and settlement of industrial disputes extending beyond the limits of any one State.

179. As to some of the reasons why not, see Braham Dabscheck, *Standard Player Contracts and Collective Bargaining*, paper presented on May 18, 1991 to The Law of Professional Team Sports Conference conducted by the Australian and New Zealand Sports Law Association Inc. and The University of Melbourne Law School Continuing Education Program, subsequently published as *Unions and Sport: Australian Professional Players' Associations*, 2 ECON. & LAB. REL. REV. 114 (1991). There is, however, little doubt that the union movement has now discovered professional team sports as area for industrial organisation: Kate Halfpenny, *When Good Sports Flex Industrial Muscle*, WORKPLACE, 6 Winter 1991.

For a good general treatment of the regulation of trade unions in Australia, see CREIGHTON & STEWART, *supra* note 13, at 159-214.

180. Though perhaps more extensive than has been believed, see Dabscheck, *supra* note 179. See also Braham Dabscheck, *The Professional Cricketers Association of Australia*, 8 SPORTING TRADITIONS 2 (1991).

181. In 1988, this Act was replaced by the Industrial Relations Act 1988 (Cth).

The High Court held in a long series of decisions¹⁸² that this constitutional power with respect to industrial disputes was confined to disputes about industrial matters in an *industry*. Thus, unless the employee's occupation was inherently industrial or the employer's business was industrial in nature, a representative association of employees could not register as a federal union and consequently obtain industrial award protection for its members. In 1955, a group of Australian Rules footballers in Victoria formed the Australian Football Players' Union and applied for registration as a federal trade union under the predecessor to Section 132 of the Conciliation and Arbitration Act 1904 (Cth). The Union met all of the formal requirements of federal registration in that it consisted of an association of more than 100 persons and its members had agreed upon an appropriate set of rules. However, the application for registration was refused by the Federal Industrial Registrar¹⁸³ on two grounds. In the first place, the Registrar found that a significant number of the Union's members might not be employees in an industry. He accepted arguments on behalf of the VFL, the Victorian Football Association and Essendon Football Club that many of the Union's members could be amateurs, perhaps in the sense that although they were paid to play football games this was really a hobby or an aside from their main employment elsewhere.¹⁸⁴ Once again we see the sports mystique rearing its head. The other ground for the Registrar's refusal of registration was his finding that VFL football was not an "industry" and his implied acceptance of an argument "that the mere playing of a sport, whether for remuneration or otherwise, is not in itself an industrial activity." This is perhaps a less surprising finding given that the commercialisation of VFL football was at that stage embryonic.

The result of this decision was that the Australian Football Players' Union remained an unincorporated association without any industrial status. It was unable to achieve any award protection for its members and it disbanded in 1956. Not until 1973 was the VFL Players' Association formed (now named the AFL Players' Association) and only recently has it considered the possibility of a renewed attempt to become a federal trade union.¹⁸⁵

Apart from federal registration as a trade union, employee associations may achieve industrial registration under State industrial legislation. Be-

182. See McCALLUM et al., *supra* note 52, at 167-235.

183. 84 C.A.R. 675 (1956).

184. It is also likely that some of the members were not paid at all, but it is not possible to ascertain whether this was so from the report of the decision.

185. It might have been able to have gained recognition under Victorian industrial relations legislation, but seems not to have pursued that path.

cause State legislation is not constrained by the limitations of section 51(xxxv) of the Constitution, it is surprising that associations of sports persons have not followed this course until very recently. However, change has begun. In 1980, the Association of Rugby League Professionals in New South Wales registered as a trade union under the Trade Union Act 1881 (N.S.W.), and in 1984 it registered under section 8 of the Industrial Arbitration Act 1940 (N.S.W.). The Association changed its name to the Rugby League Players Union in 1991 and has also affiliated with the Labour Council of New South Wales.¹⁸⁶

Despite the 1956 decision of the Federal Industrial Registrar concerning an Australian rules players' union registration application, it is now almost certain that an association of professional sports players could, apart from some practical considerations (see below), gain federal registration as a trade union. This is largely a result of the landmark *Social Welfare Union* case in 1983,¹⁸⁷ where the High Court adopted a very broad view as to what constitutes an "industrial dispute" within the meaning of section 51(xxxv) of the Constitution, and of the capacity of associations of employees to register.¹⁸⁸ However, a number of practical difficulties stand in the way of the registration of a players' union in its own right. In the first place, amendments to the Industrial Relations Act 1988 (Cth) in early 1991 impose a requirement that an association of employees seeking registration have 10,000 or more members. It seems unlikely that a team sports union could achieve this figure, even if it was an amalgamation of players from all major professional team sports. The other difficulty is that paragraph 189(1)(j) of the Industrial Relations Act requires the designated Presidential Member (who has replaced the Federal Industrial Registrar as the relevant decision-maker regarding registration) to grant an application for registration *only* if "there is no organisation to which the members of the association might conveniently belong."

In order to understand the operation of this provision, it is necessary to explain the registration mechanism. A registered union must have among its rules (which are rather like a club constitution) a rule known as an eligibility rule. This rule will prescribe the occupations and industries in which the union can legitimately recruit members. Thus, if a registered union has an eligibility rule covering members of an association seeking registration, it can object to the latter's application for registration. The grounds for objec-

186. See Braham Dabscheck, *Unions and Sport: Australian Professional Players' Associations*, 2 THE ECONOMIC AND LABOUR RELATIONS REVIEW 114, 120-21 (1991).

187. *R. v. Coldham; ex parte Austl. Social Welfare Union*, 153 C.L.R. 297 (1983) (Austl.).

188. In this respect, see also *R. v. Lee; ex parte Harper*, 160 C.L.R. 430 (1986) (Austl.).

tion would be that members of the applying association could more conveniently belong to the registered union. It is also important to appreciate that principles developed by the High Court of Australia ensure that eligibility rules are interpreted broadly and in a non-technical manner.¹⁸⁹

As far as professional team sports are concerned, two existing federally registered unions appear to have coverage of their players. The Theatrical and Amusement Employees' Association has a registered eligibility rule which provides that the following employees are eligible to join it:

Employees employed in or in connection with, including selling tickets by any means in connection therewith, or in or about, any kind of amusements, whether indoor or outdoor, including:

- (a) cultural complexes, theatres, cinemas, halls, racecourses, sports, exhibitions.¹⁹⁰

The other union which has coverage is Actors' Equity. Its eligibility rule provides that it has coverage of persons employed -

. . . for the purpose of commercial display in . . . the entertainment industry or in any other place which could reasonably be construed to be a place of entertainment

A professional team sports association could seek to form a branch of one of these two unions rather than attempt the arduous and doubtful course of seeking registration in its own right. The rules of either registered union could quite easily be changed to accommodate a largely autonomous sub-branch of professional sports players, perhaps with its own organiser and management committee. It is quite common for trade unions to create this kind of arrangement to satisfy the special interests of particular classes of their membership.

What would be the benefits to players and their associations of being a registered trade union or a member of such a union? They would include:

1. Terms and conditions of employment presently contained in player contracts could be included in a binding industrial award enforceable under the provisions of the Industrial Relations Act 1988 (Cth)¹⁹¹ or State industrial relations legislation.
2. In some States (see above) and in the federal industrial relations jurisdiction, registration would give members the right to seek remedies for unfair dismissal. It should be emphasised that the

189. See, e.g., *R. v. Cohen; ex parte Motor Accidents Bd. (Tasmania)*, 141 C.L.R. 577, 587 (1979) (Mason, J.).

190. See *Neil v. Austl. Theatrical and Amusement Employees' Ass'n*, 50 A.L.J.R. 499 (1976), which seems to indicate that sports players directly employed in "an amusement" would come within this eligibility rule.

191. CREIGHTON & STEWART, *supra* note 13, at 87-88.

unfair dismissal jurisdiction of the industrial tribunals is wider and less expensive (to the parties) than comparable remedies and proceedings in the courts (for instance, for actions for wrongful dismissal).

3. In the event that sports administrators refuse to negotiate with players' associations, grievances and claims can be taken to conciliation and arbitration. The industrial tribunals can call compulsory conferences between the parties and ultimately can arbitrate on their differences. An arbitral award will bind the employer(s).
4. Victimisation of players on the grounds of their union membership or activities is an offence.¹⁹² Moreover, most awards give unions, and union officials, access to workplaces for the purposes of recruitment — even though there may be no union members present — or to hold union meetings.

However, not all the benefits flow to the players and their associations. Employers, too, stand to gain by securing access to formal dispute resolution procedures. Registration of one player union would also prevent “potentially” disruptive splinter groups having any legal or industrial relations status. Finally, there is the possibility that the instability experienced through the restraint of trade doctrine could be resolved once and for all by the inclusion of restrictive practices, such as player draft and salary cap provisions, in registered industrial agreements (see below).

A. Enterprise Bargaining

As sports industrial relations moves closer to the mainstream institutional industrial relations system, it will inevitably become entangled in the shift toward enterprise bargaining. It is difficult to be precise about the term “enterprise bargaining” — after all, the Australian Council of Trade Unions, employer bodies, Government and the Industrial Relations Commission cannot agree on what it means — but it is possible to paint the following tentative picture.

It is likely that existing industrial tribunals will continue to set minimum terms and conditions of employment on an industry-wide basis through what are known as “industry awards” and they will retain their unfair dismissal jurisdictions. However, enterprises will be able to negotiate with enterprise bargaining units (which may or may not be part of existing industry or occupational unions) about wages and conditions applying in the enterprise. The enterprise agreements reached might include arrange-

192. *Id.* at 212-14.

ments at variance with the industry award.¹⁹³ In some scenarios, enterprise agreements may contain terms inferior to the industry award.¹⁹⁴ Enterprise agreements will, in any event, be accorded the same legal status as an award. That is, they will be a form of "quasi-legislation". They will derive their legal force from the relevant industrial relations legislation even though they may at the same time be contracts between the parties to them.

The implications for sports industrial relations are monumental. It is likely that the enterprise for the purposes of sports enterprise bargaining will be the sporting association rather than the individual club. As the Business Council of Australia has argued in its influential study, *Enterprise-Based Bargaining Units - A Better Way of Working*,¹⁹⁵ "enterprises are defined by customers and markets." Clearly, sporting associations such as the AFL, NSWRL, National Basketball League, Australian Cricket Board and National Soccer League are competing with each other in a "sports market" for audiences, sponsorships, advertising and television and radio coverage. While there is undoubtedly competition among clubs within these sports, the centralisation of administration and planning, gate and television receipts equalisation schemes, the growth of national leagues and control devices such as player drafts and salary caps point to the leagues and not the individual clubs as the enterprises. Clubs in many respects are operating divisions of the leagues.

Thus, the enterprise bargaining will be between the leagues or sports associations on one hand and player associations on the other. The legal status likely to be accorded to enterprise "bargaining-units" also offers opportunities to player associations. It may become unnecessary to form, or become part of, a federally registered union. On the other hand, even if they become sub-branches of federal unions the status as an enterprise bargaining unit may offer guarantees of autonomy.

The final and perhaps more speculative implication we see arising from enterprise bargaining is the possibility of including arrangements such as salary caps and player drafts in enterprise agreements. We should also point out for completeness that this possibility may already exist under the certified agreements provisions of the Industrial Relations Act 1988

193. This is now the case under the Industrial Relations Commission's "enterprise bargaining principle." See *National Wage Case*, Print K0300, October 1991.

194. As seems to be the case under the enterprise agreement provisions of the recent Industrial Relations Act 1991 (N.S.W.), see Part 3 Div. 2.

195. Business Council of Australia, (1989).

(Cth).¹⁹⁶ The High Court of Australia has held that an employer's recruitment and staffing practices may be the subject of an industrial award or agreement¹⁹⁷ and, by analogy, player drafts and salary caps may be able to be included in enterprise agreements or certified agreements. The advantages for sports administrators would be considerable. The legislative status accorded to enterprise or certified agreements would put restrictive arrangements such as player drafts and salary caps beyond the reach of the common law restraint of trade doctrine - a doctrine blamed for creating instability in the administration of professional team sports for the past 30 years. Further, such arrangements would, in our view, be more clearly beyond the reach of section 45 of the Trade Practices Act (Cth).

CONCLUSION

In the sense described in this paper, individualism in professional team sports is withering. If not completely dead, the individual autonomy of clubs and players has been severely eroded. In its place is the new collectivism. Perhaps the managements of sports leagues have been quicker to grasp its possibilities than the players, but there are growing indications that players' associations are looking to the processes of collective bargaining. None of this is necessarily a bad thing. It reflects the maturing of elite team sport as a form of commercial activity, distinctive in its culture and in the emotional responses it evokes in society — but, nevertheless, part of the mainstream of the world of commerce and industry. As such, it is now merely attracting the legal responses applying to the broader community. In that sense, elite team sport has grown up, but is it still "sport"?¹⁹⁸

196. See § 115. For analysis of this section see Ronald McCallum, *Collective Bargaining Australian Style: the Making of Section 115 Agreements Under the Industrial Relations Act 1988 (Cth)*, 3 AUST. J. OF LAB. L. 211 (1990).

197. *Re Cram; ex parte N.S.W. Colliery Proprietors Ass'n Ltd.*, 163 C.L.R. 117 (1987) (Austl.).

198. Further reading: (1) John Adam, *Representing Player Interests in Professional Team Sports*, PROCEEDINGS OF SPORT AND THE LAW WORKSHOP, LAUNCESTON (June 17, 1989, Centre for Commercial Law and Applied Legal Research, Monash University, Clayton, Victoria). (2) Jeffrey M. Browne, *Recent Developments in Player Contracts* in SPORT AND THE LAW (1985, Centre for Commercial Law and Applied Legal Research, Monash University, Clayton, Victoria). (3) Jeffrey M. Browne, *Playing Contracts and Pitfalls* in SPORTS AND THE LAW (1991, Business Law Education Centre, Melbourne). (4) Alan Golberg and Brian Ward, *Players' Contracts and Collective Bargaining* in SPORTS AND THE LAW (1980, Faculty of Law, Monash University, Clayton, Victoria). (5) Greg Griffin, *Life in the A.F.L. 'Days of Swine and Roses'*, 12 LAW SOCIETY BULLETIN 132 (1990). (6) Kevin Lindgren, *Sport and the Law, The Player's Contract*, 4 JOURNAL OF CONTRACT LAW 135 (1991). (7) Macve McDonagh, *Restrictive Provisions in Player Agreements*, 4 AUSTL. J. OF LAB. L. 126 (1991). (8) Brian Ward, *Player Service Contracts* in SPORTING LAW (BLEC Books, 1989, Melbourne).

